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CASE NBR: [90101002] CRY STATUS: [DECIDED]
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1	Jun 5 1990	D	Petition for writ of certiorari filed.
2	Jun 5 1990		Appendix of petitioner filed.
3	Jun 20 1990		One box of exhibits received. 3 magazines and 4 videos.
5	Jul 3 1990		Order extending time to file response to petition until August 6, 1990.
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12	Oct 9 1990		REDISTRIBUTED. October 12, 1990
13	Oct 15 1990		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

****

89-1902

No.

In The

Supreme Court of the United States

October Term, 1989

DENNIS E. PRYBA,
BARBARA A. PRYBA,
EDUCATIONAL BOOKS, INC.
and
JENNIFER G. WILLIAMS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether the inclusion of obscenity as a predicate offense under RICO (18 U.S.C. §1961 *et seq.*), or the application of RICO's forfeiture provisions upon an obscenity conviction, violates the First Amendment either as a prior restraint or as an overly broad and unconstitutional subsequent punishment.
2. Whether the Eighth Amendment requires a proportionality review before a criminal defendant's interest in a RICO enterprise is ordered forfeited.
3. Whether the admissibility of expert testimony in an obscenity case has been unduly limited.
4. Whether contemporary community standards should be measured by an acceptance or tolerance standard.
5. Whether the elements of 18 U.S.C. §1962(d) require a finding that a defendant personally agreed to commit two predicate acts.
6. Whether prior state court convictions are admissible against a defendant to prove the RICO predicate acts.
7. Whether the defendants' right to the due process of law under the Fourteenth Amendment was violated when the lower court denied them the right and ability to intelligently exercise their preemptory challenges.

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OPINIONS BELOW

On April 9, 1990, the United States Court of Appeals for the Fourth Circuit affirmed the conviction of petitioners Dennis E. Pryba, Barbara A. Pryba, Educational Books, Inc. and Jennifer G. Williams.[1] That decision is not yet reported but is reproduced in the Appendix at pages A1-A26 *infra*. The orders and decisions of the United States District Court for the Eastern District of Virginia, at Alexandria, are also contained within the Appendix filed simultaneously with this Petition.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals affirming the convictions was entered on April 9, 1990. Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1) and Rule 13.1 of the Rules of this Court. Federal jurisdiction in the District Court is invoked under 18 U.S.C. § 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 1

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment 8

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[1] B&D Corporation owned the stock of defendant, Educational Books. Video Shop, Ltd. and Marlboro News were subsidiaries of B&D Corporation. Each of these corporations was dissolved by the order of forfeiture imposed in this case (A-164).

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Statutory provisions 18 U.S.C. §§ 1465, 1961, 1962 and 1963 are reprinted in the Appendix to this Petition.

STATEMENT OF THE CASE

Dennis E. and Barbara A. Pryba were convicted of one count of violating 18 U.S.C. § 1962(a) (participating in a pattern of racketeering activity); one count of violating 18 U.S.C. § 1962(c) (employed by a criminal enterprise engaged in racketeering activities); one count of violating 18 U.S.C. § 1962(d) (conspiracy to violate § 1962(a)); and seven counts of violating 18 U.S.C. § 1465(2) (transportation of obscene materials in interstate commerce for sale and distribution). Jennifer G. Williams was charged with all of the above and convicted of all, except for Count I, a violation of § 1962(a). Educational Books, Inc. was convicted of one count of violating 18 U.S.C. § 1962(a) and one count of violating 18 U.S.C. § 1962(d).

At the time this indictment was filed, November 13, 1987, the Prybas owned corporations which operated nine video rental stores and three bookstores in northern Virginia. The video stores stocked inventories of both general audience and sexually explicit adult videos. The bookstores sold "adult" fare — that is, sexually explicit magazines.

The Government alleged that an enterprise consisting of defendants and the various unindicted corporate entities had been formed in 1973 for the purpose of disseminating obscenity in violation of 18 U.S.C. § 1465 and §§ 18.2-274 and 18.2-381 of the Virginia Penal Code. The "pattern of racketeering activity" with which Educational Books, Inc. was charged was based on 15 prior obscenity pleas or convictions of that defendant under the Virginia Penal Code during the period of time from 1981-1984.

The remaining defendants were charged with a "pattern of racketeering activity" based on the rental or sale of four video tapes and the sale of nine magazines (which had been purchased by federal investigators).

The jury found that the four video tapes and six of the nine magazines were obscene. These materials were worth $105.30 (A-9).

Subsequent to conviction on November 10, 1987, the jury considered the forfeiture allegations and, on November 18, 1987, returned its forfeiture verdict, finding that "defendants had certain interests and property which afforded them a source of influence over the enterprise" and directing that all shares of stock in B&D Corporation, Educational Books, Inc., Marlboro News, Home Video Sales, Inc., and Video Shop, Ltd., be forfeited, together with corporate assets, certain real estate and motor vehicles (A-8-9). That verdict prompted the trial court's immediate issuance of an order of forfeiture and the Government thereafter

padlocked the doors of the three bookstores and the nine video rental shops.[2]

The Fourth Circuit affirmed the convictions and the order of forfeiture, ruling that the "constitutionality of criminal sanctions against those who distribute obscene materials is well established" (A-10) and that neither the forfeiture of businesses engaged in the sale of presumptively protected First Amendment material, nor the inclusion of obscenity as a RICO predicate offense, implicates either the First or Eighth Amendments to the United States Constitution.

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[2] Additionally, Dennis Pryba was sentenced to a term of three years on Count I and terms of ten years on Counts II and III. The sentences on Count II and III were suspended, and on those two counts, Pryba was sentenced to five years probation to begin after his sentence of imprisonment. On Counts IV through X, he was sentenced to concurrent terms of five years of probation on each count to run concurrently with the sentences on Counts II and III. Pryba was also fined $75,000 on Count II.

Barbara Pryba was sentenced to suspended terms of three years each on Counts I, II, IV, V, VI, VII, VIII, IX and X and a suspended term of ten years on Count III. She was sentenced to concurrent terms of three years probation on all counts and fined a sum of $200,000 on Count III.

Educational Books, Inc. was sentenced to pay fines of $100,000 each on Counts I and III.

Jennifer Williams was sentenced to concurrent terms of three years on Counts II through X. The sentences were suspended and Williams was sentenced to concurrent terms of probation of three years on each of those counts. Additionally, Williams was fined the sum of $250 on each of said counts for a total of $2,250.

REASONS FOR GRANTING THE WRIT

POINT I

THIS CASE IS THE FIRST TO RAISE THE QUESTION OF WHETHER POST-TRIAL FORFEITURE UNDER 18 U.S.C. §1961 *ET SEQ.* (RICO), IS PERMISSIBLE UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The practical and legal essence of this case lies in the fact that the sale of $105.30 worth of magazines and tapes found obscene has resulted in the forfeiture of three bookstores and nine video rental shops. The imposition of that sanction (which included, additionally, the forfeiture of all the remaining Pryba assets, with the exception of Barbara Pryba's home and automobile) (A-164), was by no means anomalous under 18 U.S.C. § 1963. Rather, that provision authorizes the Government to take and liquidate, not merely assets traceable to the obscenity but rather, any interest or property "constituting or derived from any proceeds which the person obtained, directly or indirectly, from racketeering activity." 18 U.S.C. § 1963.

Stated at its simplest, the use of obscenity as a predicate offense under the federal RICO statute will seriously hinder, if not obliterate altogether, the viability of businesses which are presumptively protected under the First Amendment to the United States Constitution. That foreseeably direct and dire consequence stands as an affront to the First Amendment and generates a host of practical questions as well; for those who operate the businesses affected, those who would prosecute them and finally, for the courts which are entrusted with the resolution of yet another facet of this "intractable problem of obscenity." *Interstate Circuit v. Dallas*, 390 U.S. 676, 704 (1968) (separate opinion).

The issues which are discussed in these pages are novel in that they have not appeared in the context of a post-trial RICO forfeiture. But recent cases of this Court have resolved related issues and have given intimations of questions to come, questions which arise in the tangible and undisputed factual context of this case. Mention of those cases highlights the appropriateness of a grant of certiorari herein.

In *Fort Wayne Books, Inc. v. Indiana*, ____U.S.____, 109 S.Ct. 916 (1989), this Court held that Indiana's RICO statute[3] permitting the pre-trial seizure of material presumptively protected under the First Amendment, was a constitutionally untenable prior restraint, imposed without a final judicial determination of the materials' obscenity: "Valid grounds for seizure is insufficient to interrupt the sale of presumptively protected books and films." *Id.* at 929.

Although the Court was urged to further determine whether a post-trial forfeiture was likewise unconstitutional, it declined to do so since there had been no post-trial forfeiture in *Fort Wayne* or its companion case, *Sappenfeld v. Indiana*. *Id.* at 928, fn.11. Justices Stevens, Brennan and Marshall, however, demurred; stating that they would extend the Court's holding to prohibit post-trial forfeitures "based on nothing more than a 'pattern' of obscenity misdemeanors." *Id.* at 939 (Stevens, J., dissenting in no. 87-614 and concurring in part and dissenting in part in no. 87-470).

Petitioners seek a grant of certiorari in *United States v. Pryba*, ____F.2d____ (4th Cir. 1990) (reproduced herein at A-1-26), since this case does squarely pose the question of whether the post-trial forfeiture of bookstores and their inventories, solely on the basis

[3] *See*, Ind. Code § 34-4 — 30.5-3(b) (1982).

of a pattern of past obscenity convictions, withstands constitutional scrutiny. *Fort Wayne Books, Inc. v. Indiana*, 109 S.Ct. at 938, fn.26.

Pryba is the first case prosecuted under the Federal Racketeering Influenced and Corrupt Organizations Act (RICO, 18 U.S.C. §§ 1961 *et seq.*), where the only predicate convictions were for crimes of obscenity.[4] The Court's determination of the validity of post-judgment forfeiture in this case will have enormous impact upon the future of RICO obscenity prosecutions, both state and federal.[5]

RICO provisions, in general, were drafted in order to provide prosecutors with "drastic methods" of curtailing undesirable criminal activity. *Russello v. United States*, 464 U.S. 16, 26-29 (1983); *United States v. Turkette*, 452 U.S. 576, 586-593 (1981). When, in 1984, obscenity was added to the list of predicate offenses, prosecutors were handed a potent new means of attacking obscenity and pornography and they vowed a commitment to employ the RICO obscenity legislation to the fullest.[6] Their use of post-trial forfeiture as their most effective means of reaching obscenity (and the presumptively protected as well) has been validated by the Fourth Circuit in *United States v. Pryba*, and thus, this Court's review of that decision and its analysis of the myriad

[4] In 1984, the list of RICO predicate offenses was expanded to include obscenity. *See*, 18 U.S.C. § 1961(1).

[5] As noted in *Fort Wayne Books*, 109 S.Ct. 916, several states have followed the lead of Congress in including obscenity as a predicate offense under their state RICO statutes. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-2301 (1989); Cal. Penal Code § 186.2(a)(20) (Deering Supp. 1989); Conn. Gen. Stat. § 53-394 (1989); Ga. Code Ann. § 16-14-3(9)(A)(xiii) (Supp. 1989); Ind. Code Ann. § 35-45-6-1 (Burns 1985). These states also permit post-trial forfeitures of property. *See*, Ariz. Rev. Stat. Ann. §§ 13-2313-13-2314 (1989); Cal. Penal Code § 186.3 (Deering 1985); Conn. Gen. Stat. Ann. § 53-397 (1989); Ga. Code Ann. § 16-14-7 (1988); Ind. Code Ann. § 34-4-30.5-2 (Burns 1986).

[6] *See*, for example, *New York Times*, January 12, 1988, Col. 1, Justice Department plans to front a new assault on obscenity via the federal RICO statute.

constitutional ramifications will have a substantial, concrete impact on the proper application of RICO to obscenity law and First Amendment precedent in general.

At present, the courts have come to no consensus regarding the validity of post-trial forfeiture. In *Western Business Systems, Inc. v. Slaton*, 492 F.Supp. 513 (N.D. Ga. 1980), the court upheld the Georgia RICO forfeiture statute noting (as did the Fourth Circuit in *Pryba*) that the forfeiture is unrelated to the expressive nature of books and magazines but occurs because they are items derived from crime, no matter how indirectly.

In contrast stands *Arizona v. Feld*, 155 Ariz. 88, 745 P.2d 146, 154-155 (Ariz. App. 1987), *cert. denied*, 485 U.S. 977 (1988). Writing that forfeiture provisions predicated upon an obscenity conviction were constitutionally permissible if they extended only to assets which were the "ill-gotten gains" of the racketeering activity, the Court held that any further stricture upon a defendant's assets would "restrict future, presumptively protected speech, rather than [punish] the distribution of unprotected speech in the past." Still other courts have opted to by-pass the question altogether (*see, e.g., Alexander v. Thornburg*, 713 F. Supp. 1278, 1294 (D. Minn. 1989), which further suggests that certiorari review is appropriate at this juncture.

The Court's grant of certiorari would also necessarily clarify the scope and proper application of the ruling in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). In *Arcara*, this Court determined that the one-year closure of a bookstore, based upon a past finding of criminal conduct, did not constitute a prior restraint of the sale and distribution of non-obscene materials. The Court said: "The legislation [New York's Nuisance and Abatement Statute, New York Public Health Law, § 2330 *et seq.*] providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity." *Id.* at 707 (*but see*, concurring opinion of O'Connor, J., in *Arcara v. Cloud*

Books, 478 U.S. at 707, use of statute as pretext for suppressing indecent books requires analysis under the appropriate First Amendment standard of review).

United States v. Pryba, in contrast, does concern legislation specifically directed towards books and theaters — forms of expression which unequivocally enjoy the encircling mantel of First Amendment protections. Thus, despite the ruling below, petitioners contend that the First Amendment is implicated in this case in a way that it was not in *Arcara* and that it remains for this Court to illuminate the exact nature of the intersection between the Constitution and post-trial forfeiture and the proper mode of analysis to be applied.

Petitioners believe that because the legislation is so directly related to the regulation of pure speech, the validity of any restriction on that speech must be measured by the most stringent standards. *See, Bates v. Little Rock*, 361 U.S. 516, 524 (1960) ("[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling"). In adding obscenity to a statutory framework for the very purpose of employing forfeiture as a means of suppressing obscenity (the supposed handmaiden of organized crime), Congress also is directly (not incidentally) regulating one of society's most precious commodities: the written word. To seek to eradicate obscenity by means of forfeiture is to make a conscious decision to permanently suppress books and movies which are undeniably protected by the First Amendment. The legislative decision to take that ominous step demands the forceful response that this Court has historically made when First Amendment freedoms are directly jeopardized by a governmental body: "regulatory measures ... no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." *Louisiana ex rel Gremillion v. NAACP*, 366 U.S. 293, 297 (1961).

In *Arcara v. Cloud Books*, 478 U.S. 697, this Court held that First Amendment scrutiny would be applied to a statute regulating conduct which had an expressive element or to statutes which, although having no such expressive element "impose[d] a disproportionate burden on those engaged in protected First Amendment activities." *Id.* at 704. Relying upon that rationale, the Fourth Circuit, in *Pryba*, predicated its decision upon the fact that because obscenity is itself a crime, the contours of the punishment imposed for the criminal activity need not be tested by First Amendment standards. The Court said: "there is nothing so unusual about obscenity convictions that they may not be used as RICO predicate offenses. There is no constitutional protection for materials adjudged to be obscene" (A-10).

Although obscenity itself is a crime, a past finding of obscenity has never, in this Court's view, justified a ban on further communicative offerings on the basis of that past obscenity. Thus, in *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980), the Court declared that the closure of a motion picture theater on the ground that the theater had, in the past, shown obscene films, created an unconstitutional prior restraint "of indefinite duration on the exhibition of motion pictures that have not been finally adjudicated to be obscene." *Id.* at 309.

Should the Court, however, find that the criminal conviction of obscenity removes the *Pryba* case from the *Vance* paradigm, a question still arises as to whether the First Amendment is not implicated either by virtue of the fact that the conduct sought to be regulated has an expressive element (triggering a variant of the test of *United States v. O'Brien*, 391 U.S. 367 (1968)), or, because the statute imposes a disproportionate burden on those engaged in First Amendment activities. In *Minneapolis Star and Tribune Co. v. Minneapolis Commissioner of Revenue*, 460 U.S. 575 (1983), the Court ruled that even when legislation is not directed towards speech or activity with an expressive element, the First

Amendment is drawn into play where that legislation has the inevitable effect of imposing its burden upon those, such as the petitioners in this case, whose very businesses, by virtue of the books and magazines sold therein, receive special protections under the First Amendment. *Fort Wayne Books v. Indiana*, 107 S.Ct. 916, and *Arcara v. Cloud Books*, 478 U.S. 697, each — the first, directly; the second, by implication — leave open the question of how the First Amendment is affected by application of RICO forfeiture to obscenity. The inevitable tension between the Constitutional guarantees and the organized crime statute poses practical and legal problems which are presented in tangible form in this case. The grant of certiorari would, therefore, be appropriate.

POINT II

REFUSAL TO GRANT CERTIORARI WILL BE TAKEN AS TACIT APPROVAL OF A DECISION WHICH PERMITS THE IMPOSITION OF A PRIOR RESTRAINT UPON PROTECTED EXPRESSION

Although a denial of certiorari cannot be deemed a decision on the merits, *United States v. Carver*, 260 U.S. 482, 490 (1923), it is generally construed as approval of the decision below. *See, e.g., Simmons v. Union News Co.*, 382 U.S. 884, 886 (1965) (Black, J., dissenting from denial of certiorari). The repercussions of such a denial in this case would dismantle, without benefit of any explanation, the body of obscenity jurisprudence which the Supreme Court has so painstakingly crafted.

If post-judgment forfeitures are permitted upon the basis of obscenity convictions, prosecutors will have achieved a convenient method by which to rid society of all that it deems undesirable: the sexually explicit as well as the obscene. The constitutional pitfall of that endeavor, however, is that this Court has stated repeatedly that, while obscenity itself is not entitled to the protections of the First Amendment, sex and obscenity are not synonymous and the former, a topic of universal interest and concern, cannot be restricted under the guise of repressing the obscene:

> The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protections of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.

Roth v. United States, 354 U.S. 476, 488 (1957).

The Court's continued recognition that the sexually explicit must not be confused with the legally obscene has led to its caveat that the separation of one from the other necessitates the employment of sensitive tools, *Speiser v. Randall*, 357 U.S. 513, 525 (1958), and its exhortation to the courts that "a state is not free to adopt whatever procedures it pleases for dealing with obscenity without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrants of Property*, 367 U.S. 717, 731 (1961).

In *Marcus v. Search Warrants of Property*, the Court invalidated state statutory procedures permitting the pre-trial seizure of material thought to be obscene on the strength of the conclusory assertions of a single police officer. In condemning this process, which resulted in the seizure of thousands of copies of presumptively protected material, the Court reasoned that, for purposes of search and seizure, obscenity was not the equivalent of gambling paraphernalia or other contraband and could not be treated as such. *Id.* at 730.

While, admittedly, *Marcus* concerned a pre-trial seizure, the essence of the Court's holding was its fear that, absent procedures designed to "focus searchingly" on the question of obscenity, the non-obscene would be suppressed along with publications ultimately determined to be illegal. "Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantees." *Marcus v. Search Warrants of Property*, 367 U.S. at 733.

Should this Court allow the decision below to stand, on the ground that forfeiture is a legitimate criminal sanction imposed upon conviction, the essence of each of the precedents noted above would be negated. The starting point of obscenity law has been the recognition that whatever the basis for the regulation,[7] great care must be used in structuring the processes so that books or magazines, movies or videos will not be banned because of the censor's fervid belief that they undermine our morals. Surely the breadth and substance of that principal should not be diminished by a ruling that permits the destruction of books because a shopkeeper has been found guilty of past obscenity convictions.

This Court has been loathe to reject its constant and terrible burden of defining obscenity with care and precision and of applying that definition to the masses of material pressed upon the Court. "Such an abnegation of judicial supervision in this

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[7] Be it that of the zoning power, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); the penal statute, *Miller v. California*, 413 U.S. 15 (1973); or the administrative licensor, *Southeastern Promotions v. Conrad*, 420 U.S. 41 (1975).

field would be inconsistent with our duty to uphold the constitutional guarantees." *Jacobellis v. Ohio*, 378 U.S. 184, 187-188 (1964) (opinion of Brennan, J.). Petitioners submit that a refusal to accept this case for review would be a similar derogation of duty when the ruling below stands as an affront to perhaps the most prized of our constitutional guarantees, a freedom of expression, which, while not boundless, is not prematurely and unduly stifled.

POINT III

THE DECISION BELOW AUTHORIZES THE IMPOSITION OF A PRIOR RESTRAINT OR, ALTERNATIVELY, AN OVERLY BROAD AND UNCONSTITUTIONAL SUBSEQUENT PUNISHMENT

A. Prior Restraint.

In *Arcara v. Cloud Books*, this Court held that the State's one-year closure of the bookstore would not be a prior restraint since: (1) the closure would not prevent the sale of the material at another location; and (2) the closure was not being sought "on the basis of an advance determination that the distribution of particular materials is prohibited — indeed, the imposition of the closure order has nothing to do with any expressive conduct at all." *Arcara*, 478 U.S. at 706, n.2.

This case stands in contrast to *Arcara* in that both indicia of a prior restraint are present. As noted earlier, the legislative decision to debilitate organized crime through its alleged connection to obscenity was also a deliberate decision to substantially restrict free expression. The decision to prosecute obscenity under a statute mandating forfeiture of the defendant's assets, which presumably would usually include bookstores,[8] was also a decision directly affecting the sale and availability of materials protected under the First Amendment. As such, post-trial forfeiture predicated upon an obscenity conviction is indubitably legislation intimately related to the regulation of free expression.

That the situation of obscenity within the RICO construct bespeaks a deliberate legislative indifference to the fate of constitutionally safeguarded materials is also reflected in the statements of Senator Jesse Helms, sponsor of the legislation.[9] In seeking the inclusion of obscenity into RICO, Senator Helms revealed clearly that he was concerned not only with the symbiosis between purveyors of obscenity and organized crime; but also that he supported the legislation's passage because of its moral component. Helms stated:

> In essence, pornography degrades the dignity and worth of human beings by presenting a false picture of human sexuality. It holds sexuality out as an end in itself, totally removed from its proper and normal place as a means in marriage for conjugal love and the procreation of children. Pornography demeans because it rejects the true meaning of sexuality.

130 Cong. Rec. 433 (January 30, 1984).

It is evident that, if this legislation was not passed specifically for the purpose of removing the sexually explicit but non-obscene, the fact that closure of adult bookstores would inevitably follow was deemed a salutary by-product of the statutory scheme.

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[8] *See, Fort Wayne Books, Inc. v. Indiana*, 109 S.Ct. at 937 (Stevens, J., dissenting in no. 87-614 and concurring in part and dissenting in part in no. 87-470), noting that "the enforcement of Indiana's RICO/CRRA statutes has been primarily directed at adult bookstores."

[9] While the legislative purpose of a statute may, perhaps, not be assumed from the statements of a supporter, surely it is proper to consider those statements as positing at least some of the foremost concerns and motivations standing behind the legislation.

Thus, this case is far different from *Arcara* where the nuisance law did not have the direct and irrevocable consequence of foreclosing the community from access to publications with both a general and adult content. Here, the resulting forfeiture of material protected under the First Amendment was not incidental to the legislation but a directly identifiable consequence of it.

Nor, for purposes of analyzing the issue of prior restraint, does it matter that the restraint occurs after an obscenity conviction and without the issuance of any injunction or order actually suppressing that which has not been determined obscene. A prior restraint can result from an informal system of censorship as well as from a tangible injunction or order.

In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1968), there was no actual suppression of speech prior to its publication or dissemination. Rather, the "Rhode Island Commission to Encourage Morality in Youth" informally encouraged book sellers to remove certain objectionable volumes from their shelves if they did not wish the Commission to attempt to initiate obscenity prosecutions. The Supreme Court held the activities of the Commission unconstitutional.

Although recognizing that the Commission was not actually suppressing or regulating obscenity, the Court ruled that, nevertheless, the Commission was guilty of an informal method of censorship:

> "We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief."

Id. at 67.

Petitioners submit that an equivalent type of informal censorship occurs when post-trial forfeiture is permitted. Few book sellers will have either the temerity or the fiscal resources to face a RICO indictment when the result may mean complete and final closure of their businesses. The chilling effect is far more onerous than that sanctioned by this Court in past cases.[10] The difference is in the type and degree of punishment imposed. While, of course, all criminal obscenity penalties will have an inhibitory effect on the distribution of protected material, the forfeiture of a business and its assets constitutes the most extreme form of suppression, both because of the final dismantling of the store and also, because the books themselves must be forfeited to the Government. Our right to buy and read what we wish (except for the very narrow band of obscenity) is so precious and so firmly entrenched in our concept of a free society, that a statute which permits the Government to take and destroy what it concedes are legal and legitimate publications, must be deemed pernicious. It is for that very reason that the concept of prior restraint remains intrinsic to First Amendment law: "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

The forfeiture provisions of 18 U.S.C. § 1963(a) are also distinguishable from the closure in *Arcara* because, in that case, the book seller remained free to continue his business at another location. Conversely, the federal forfeiture statute does not operate as simply a closure of the locus of the bookstore — instead, it necessitates the sale of the building, destruction (or at least transfer to the

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[10] For instance, *Smith v. United States*, 431 U.S. 291, 296, n.3 (1977) (5-year prison term and $5,000 fine for first offense; 10-year term and $10,000 fine for each subsequent offense); *Ginzburg v. United States*, 383 U.S. 463, 464-465, n.2 (1966) (5-year prison term and $5,000 fine).

Government) of the assets of the physical plant, including the presumptively protected material and the actual hardware, cash registers and the like.

In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), the local government forbade live entertainment within the borough. The Court held that although the zoning power is "undoubtedly broad," it still must be exercised within constitutional limits and thus, could not legitimately infringe upon protected First Amendment activity unless its regulations were narrowly drawn and furthered sufficiently substantial Government interests. *Id.* at 68. Because the prohibition against any live entertainment was neither a minimal nor incidental burden on First Amendment values, the Court overturned it.

So, too, in this case, RICO forfeiture imposes an inordinately heavy burden on free expression. Moreover, a primary effect of the legislation will be the virtual disappearance of adult bookstores which provide a form of entertainment which not only receives the full protection of the First Amendment, *see, Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), but also is in some demand by the general public. *See, Fort Wayne Books v. Indiana*, 109 S.Ct. at 936, n.21 (Stevens, J.).

Given that the penal statute at hand was drafted in order to regulate obscenity and given its deleterious effect on the dissemination and distribution of protected materials, petitioners submit that a prior restraint has been effected and implore this Court to grant certiorari in order to review and hopefully, obviate that result.

B. Subsequent Punishment.

Should this Court be of the view that no prior restraint results from imposition of forfeiture subsequent to an obscenity conviction, it still remains to be considered whether the punishment of

forfeiture is not itself an unconstitutional and overly broad response to the fight against organized crime/obscenity.

Despite the Fourth Circuit's holding that the First Amendment was not implicated since the defendant had been afforded full due process rights at a criminal trial, this Court has ruled explicitly that:

> "First Amendment protection reaches beyond prior restraints" (*Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101 (1979)), and that:
>
> > "Even when a state attempts to punish a publication after the event it must nevertheless demonstrate that its punitive action was necessary to further the state interests asserted." *Id.* at 102, citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

Given those precepts, if the case at bar is deemed entirely outside the realm of prior restraint, petitioners ask the Supreme Court to grant the writ of certiorari in order to assess whether post-trial forfeiture can ever comport with First Amendment doctrine, whether the Government's interests in suppressing organized crime are sufficiently furthered by forfeiture, and finally, whether the means chosen to advance those interests are narrowly enough drawn to satisfy the demands of the Constitution.

The breadth of the forfeiture statute is underscored by its very language which demands the forfeiture of any interest in any enterprise established in violation of 18 U.S.C. § 1962 as well as any property constituting or derived from any direct or indirect proceeds obtained from racketeering activity.

The amorphous quality of that language precludes a finding that the legislation was narrowly tailored to meet First Amendment concerns. On a practical level, it means that once the Government secures its two obscenity convictions (perhaps based on

facts as essentially innocuous as the sale of two copies of a hard core magazine), the business concern selling those magazines (again, quite possibly the general corner store or bookstore chain), will be padlocked and the books and expressive materials contained therein transferred to the Government. That result is not unlikely under the RICO legislation and the probability of its occurrence, as well as its horrific scope, should demand this Court's attention. For despite all protestations that the statute is constitutional as a criminal penalty, one which will be utilized in even-handed fashion and with discretion, this Court has always eschewed facile labels as a means of constitutional analysis. "As far back as the decision in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 720-721 (1931), this Court has recognized that the way in which a restraint on speech is 'characterized' under state law is of little consequence." *Fort Wayne Books, Inc. v. Indiana*, 109 S.Ct. at 929. An unlawful prior restraint cannot escape constitutional analysis merely by recharacterization of the restraint as a sanction for a pattern of racketeering activity.

Thus, while conceivably the statute will have some efficacy in deterring obscenity, whether or not connected to organized crime, petitioners submit that it cannot pass constitutional muster when the deleterious "operation and effect," of the statute (in this case the closure of nine video rental stores and three bookstores) so heavily outweighs the Government's interests asserted. As stressed by this Court in *NAACP v. Button*, 371 U.S. 415, 433 (1963), the danger of overbroad legislation is its "susceptibility to sweeping and improper application." Because the penal sanction under review seeks to control organized crime through the wholesale suppression of expression, its viability raises significant constitutional questions of overbreadth, questions which should be resolved by this Court.

POINT IV

THERE IS A DIRECT CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE EIGHTH AMENDMENT REQUIRES A PROPORTIONALITY REVIEW OF THE FORFEITURE OF A DEFENDANT'S INTEREST IN A RICO ENTERPRISE

The Eighth Amendment guarantees that punishment will be proportionate to the crime of which a defendant has been convicted. *Solem v. Helm*, 463 U.S. 277 (1983). However, the Fourth Circuit has ruled that the Eighth Amendment does not require a proportionality review of any sentence less than life imprisonment without the possibility of parole. *United States v. Pryba* (A-18); *United States v. Whitehead*, 849 F.2d 849, 860 (4th Cir. 1988); *United States v. Rhodes*, 779 F.2d 1019, 1027-28 (4th Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986).

Thus, although the petitioners in the instant case argued to the District Court and the Court of Appeals that the forfeiture sought was disproportionate to the crime in that the income derived from the alleged pattern of racketeering activity amounted to only an infinitesimal percentage of petitioners' legitimate income, both courts declined to conduct a proportionality review (A-18).

In direct conflict with this position, the Ninth Circuit has held that where a plaintiff makes a prima facie showing that forfeiture may be excessive, the district court must make a determination that the interest ordered forfeited is not so grossly disproportionate to the offense committed as to violate the Eighth Amendment. *See, United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987); *and see, United States v. Horak*, 833 F.2d 1235, 1251 (7th Cir. 1987) and, *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir. 1983).

The Fourth Circuit, however, has reasoned that since in a RICO case the magnitude of the forfeiture is directly keyed to "the magnitude of the defendant's interest in the enterprise conducted in violation of the law," forfeiture under § 1963 is *per se* proportional. *United States v. Grande*, 620 F.2d 1026 (4th Cir.) *cert. denied*, 449 U.S. 830, *and*, 449 U.S. 919 (1988). The Ninth Circuit, in particular, has rejected that rationale as noted in this excerpt:

> The Fourth Circuit misapplied the eighth amendment's requirement of proportionality. That the statute ties the amount forfeited to a defendant's stake in an enterprise that violated the law merely states the issue. As we have previously noted, RICO's impressive breadth, and the interplay of its substantive and punitive provisions, may result in forfeitures of vast amounts of property as a result of relatively minor offenses. In any one case the amount forfeited may have no relationship whatsoever to the severity of the wrong committed.

United States v. Busher, 817 F.2d at 1414-1415, n.9.

The disagreement between these judicial camps on a novel issue with significant constitutional overtones should, petitioners submit, compel this Court's review.

POINT V

THIS COURT'S GUIDANCE REGARDING THE ADMISSIBILITY OF EXPERT TESTIMONY IS NEEDED TO RESOLVE CONFLICTS AMONG THE LOWER COURTS

A. Public Opinion Polls

The defense in this case proffered an expert to testify as to the results of a public opinion poll conducted for this case.[11] Although the lower court did not find error in the methodology used to conduct the poll, it excluded the results upon its determination that the questions (1) were not relevant, and (2) did not completely cover the content of the materials on trial.

The questions set forth in the survey were nearly identical to those used across the nation. However, state and federal courts have reached different conclusions as to the admissibility of these surveys. For example, in *People v. Nelson*, 410 N.E.2d 476; *Saliba v. State*, 475 N.E.2d 1181; and *Carlock v. State*, 609 S.W.2d 787 (Tex. Crim. App. 1980), the courts admitted survey questions and results nearly identical to those posed here. On the other hand, the courts in *State v. Anderson*, 366 S.E.2d 459; *Flynt v. State*, 264 S.E.2d 669; *People v. Thomas*, 37 Ill. App. 3d 320, 346 N.E.2d 190 (1976), and the lower court here, ruled simi-

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[11] The survey questions asked were:

(1) whether he/she thought that the portrayal of "nudity and sex" and materials available to adults only had become more or less acceptable in recent years;

(2) whether he/she agreed or disagreed with the statement that adults who want to should be able to obtain and view materials depicting "nudity and sex;"

(3) whether he/she believed that he should be able to buy or rent materials depicting "nudity and sex;" and

(4) whether he/she agreed or disagreed with the statement that adults who want to should not be able to buy or rent materials depicting "nudity and sex."

lar questions and results inadmissible. These conflicting decisions result from court confusion regarding contemporary community standards and how they are gauged and thus, the assistance of this Court is sought.

B. Comparable Materials

The court in *Womack v. United States*, 294 F.2d 204 (D.C. Cir.) *cert. denied*, 365 U.S. 859 (1961), introduced the concept that the existence of comparable materials may be relevant to a showing that works are acceptable in the community. Since the 1961 *Womack* decision, numerous courts have faced the issue of whether certain comparable materials are admissible in an obscenity prosecution. The result is that:

> There has been a considerable amount of confusion in the courts as to the admissibility and function of comparison evidence in obscenity cases. Some jurisdictions have held it reversible error to reject such evidence, while others exclude it rather summarily.

United States v. Womack, 166 U.S. App. D.C. 35, 41, 509 F.2d 368, 374 (D.C. Cir. 1974), *cert. denied*, 422 U.S. 1022 (1975); *comparing, Woodruff v. State*, 11 Md. App. 202, 273 A.D.2d 436 (1971); *[and] Yudkin v. State*, 229 Md. 223, 182 A.D.2d 798 (1962); *In re Harris*, 56 Cal. 2d 879, 366 P.2d 305 (1961) *with, State v. Jungclaus*, 176 Neb. 641, 126 N.W.2d 858 (1964); *[and] People v. Finkelstein*, 11 N.Y.2d 300, 183 N.E.2d 661 (1961); and in the federal courts *comparing, Kahm v. United States*, 300 F.2d 78, 84 (5th Cir. 1962) *with Miller v. United States*, 431 F.2d 655, 659 (9th Cir. 1970); *and, see, United States v. Pinkus*, 579 F.2d 1174, 1175 (9th Cir. 1978) ("The admissibility of 'comparables' in obscenity prosecutions has been a subject of confusion.")

In addition to confusion on the threshold question of admissibility of comparable material evidence, disputes have also arisen as to the foundational basis required for admission of such evi-

dence. Specifically, various lower courts have seized on the words of this Court in *Hamling v. United States*, 418 U.S. 87, 125 (1974), that "availability of similar material ... does not automatically make [it] admissible." Other courts have recognized that widespread community availability may be accepted as circumstantial evidence of contemporary community standards. *See, e.g., United States v. 2,200 Paper Back Books*, 565 F.2d 566, 571 (9th Cir. 1977); *Keller v. State*, 606 S.W.2d 931, 933-934 (Tex. Cr. App. 1980); *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132, 137 (2d Cir. 1983).

In the case at bar, the defense offered the testimony of an expert who had purchased many sexually explicit magazines and videotapes (comparable to those charged in this case) from diverse locations throughout the District, including general bookstores, drugstores, news stands, grocery stores, and candy and gift shops. Based on his extensive study, the defense attempted to introduce the comparable materials so purchased. In excluding the evidence, the trial court complained that the information "although perhaps reflecting availability of the materials surveyed, fails to evidence community acceptance" (A-110). In so doing, the court ignored clear precedent establishing that widespread community availability is probative of community acceptance.

C. Ethnographic Study

In a further attempt to educate the jury as to contemporary community standards, the defense wished to present the testimony of Dr. Joseph Scott, a sociologist, criminologist and associate professor at Ohio State University with a background in statistical methodology. He had conducted an ethnographic study of the attitudes of the relevant adult community toward sexually explicit material. An ethnographic study was described as a recognized methodology for making a qualitative assessment of community standards in a given area.

During the course of his ethnographic study, Dr. Scott visited 75 video stores to determine the pervasiveness of sexually explicit magazines and books; interviewed proprietors of these establishments to determine the acceptability of the materials and spoke with the editors of 17 newspapers and other publications concerning complaints about obscenity or pornography during the year prior to trial. The information gathered reflected the acceptable nature of sexually explicit materials in the relevant geographic area.

The judicial confusion regarding availability versus acceptability of sexually explicit materials detailed in Point V, Sub. B, *supra*, resulted in the exclusion of this expert's valuable information. The lower court again failed to recognize that body of case law which acknowledges that widespread community availability is probative of community acceptance and petitioners thus ask the Court to review this question.

POINT VI

CONFUSION ABOUNDS AS TO WHETHER CONTEMPORARY COMMUNITY STANDARDS ARE TO BE MEASURED BY AN ACCEPTANCE OR TOLERANCE STANDARD

A recurring argument in obscenity prosecution centers around whether contemporary community standards are to be measured by an acceptance standard or a tolerance standard.[12] Defendants invariably cite to this Court's repeated use of the word, tolerance, when describing contemporary community standards. See *New*

[12] The lower court here specifically charged the jury that "contemporary community standards are set by what is, in fact, accepted in the adult community as a whole, and not by what the community merely tolerates. ..." (A-21).

York v. Ferber, 458 U.S. 747, 761, n.12 (1982); *Smith v. United States*, 431 U.S. 291, 305 (1977); *Jacobellis v. Ohio*, 378 U.S. at 194.

However, the lower court held here, as have other courts, that contemporary community standards are to be measured by what is in fact accepted in the community as a whole and not what is merely tolerated. *See, e.g., United States v. Battista*, 646 F.2d 237, 245 (6th Cir.), *cert. denied*, 454 U.S. 1046 (1981), and, *Sedelbauer v. State*, 428 N.E.2d 206, 210-211 (Ind. 1981), *cert. denied*, 455 U.S. 1035 (1982).

These divergent views on a crucial issue which repeatedly surfaces in obscenity prosecutions requires resolution by this Court.

POINT VII

A CONFLICT EXISTS AMONG THE CIRCUITS AS TO THE ELEMENTS OF 18 U.S.C. § 1962(d)

Petitioners were convicted of RICO conspiracy on the basis of jury instructions which did not require that the jury find that petitioners had *personally* agreed to commit two predicate acts in a RICO context. The court in *United States v. Winter*, 663 F.2d 1120 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983), specifically outlined the two predicate act issue as follows. Although Section 1961(5) states that a "pattern of racketeering activity" requires at least two acts of racketeering activities;

> The statute, however, does not make clear the extent of the activity in which each defendant must engage to be culpable as RICO conspirators: must each RICO conspiracy defendant agree that someone in the enterprise will commit two predicate crimes, must each member agree to commit two

such acts individually, or must each member actually commit two such acts individually?

Id. at 1136.

In answering this question, the Circuits are clearly divided. The First Circuit in *United States v. Winter*, determined that protection to those who might otherwise be convicted through guilt by association would be afforded by the minimum requirement that each defendant be shown to have personally agreed to commit two or more specified predicate crimes. Similarly, the Second Circuit required proof that the defendant, himself, at least agreed to commit two or more predicate crimes. *United States v. Ruggiero*, 726 F.2d 913 (2d Cir.), *cert. denied sub nom, Rabito v. United States*, 469 U.S. 831 (1984).

Other courts have required only that each defendant agree that members of the conspiracy will violate RICO through the commission of two prescribed acts. *See, United States v. Leisure*, 844 F.2d 1347, 1367 (8th Cir.), *cert. denied*, ____U.S.____, 109 S.Ct. 324 (1988); *United States v. Joseph*, 781 F.2d 549, 554 (6th Cir. 1986); *United States v. Neapolitan*, 791 F.2d 489, 491 (7th Cir.), *cert. denied*, 479 U.S. 940 (1986); *United States v. Adams*, 759 F.2d 1099, 1116, *cert. denied*, 474 U.S. 971 (1985); *United States v. Tille*, 729 F.2d 615, 619 (9th Cir. 1984), *cert. denied*, 469 U.S. 845 (1984); *United States v. Carter*, 721 F.2d 1514, 1528 (11th Cir. 1984).

The Fourth Circuit has joined the ranks of the latter courts (A-24). Resolution of the conflict among the Circuits will avoid its inevitable recurrence in all future RICO prosecutions.

POINT VIII

THIS COURT HAS NOT DETERMINED IF PRIOR STATE COURT CONVICTIONS ARE ADMISSIBLE TO PROVE RICO PREDICATE ACTS

No controlling authority exists to settle the question of whether a prior state court conviction is admissible for purposes of proving the predicate acts of racketeering activity necessary to establish a RICO violation. Although the court below upheld the introduction of various state court convictions of petitioner Educational Books, Inc.,[13] the legality of such action has not been considered by this Court and is seemingly in direct conflict with dual sovereignty considerations.

Since the concept of dual sovereignty prohibits the use of state acquittals in the federal context as a bar to prosecution, *Bartkus v. Illinois*, 359 U.S. 121 (1959), this Court should rule, as the logical converse, that the government cannot prove predicate acts for purposes of a federal RICO conviction through state court judgments.

---

[13] The District Court's decision, referred to by the Fourth Circuit, relied on two rulings which upheld use of a defendant's state court plea in a later non-RICO federal prosecution, *United States v. Andreadis*, 366 F.2d 423 (2d Cir. 1966) and *United States v. Myers*, 49 F.2d 230 (4th Cir.), *cert. denied*, 283 U.S. 866 (1931), and two decisions holding a prior federal court conviction admissible in another federal proceeding to establish a RICO predicate act. *United States v. Erwin*, 793 F.2d 656 (5th Cir. 1986); *United States v. Persico*, 621 F.Supp. 842 (S.D.N.Y. 1985).

POINT IX

CONTRARY TO ESTABLISHED LAW, THE COURT SEVERELY LIMITED *VOIR DIRE* AND PREVENTED PROPER EXERCISE OF DEFENDANT'S PREEMPTORY CHALLENGES

This Court has long recognized the right of preemptory challenges as "one of the most important rights secured to the accused," *Pointer v. United States*, 151 U.S. 396, 408 (1894). In obscenity matters, the Court has specifically recognized that it is helpful to know "how heavily the juror has been involved in the community." *Smith v. United States*, 431 U.S. at 308.

To this end, petitioners requested that the trial court question to what community organizations, if any, the prospective jurors belonged. Refusing this request, the trial court advised that, at most, it would ask whether the prospective juror belonged to any community organization (without requiring that they be listed) or if s/he belonged to no community organizations. However, the trial court in fact did not ask any such question, and its refusal to do so severely impaired the defendants' ability to exercise intelligently their preemptory challenges. Review is therefore merited.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court grant this petition for writ of certiorari.

Respectfully submitted,

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89-1902

No.

In The

Supreme Court of the United States

October Term, 1989

DENNIS E. PRYBA,
BARBARA A. PRYBA,
EDUCATIONAL BOOKS, INC.
and
JENNIFER G. WILLIAMS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

Appendix to
Petition for Writ of Certiorari

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5001

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DENNIS E. PRYBA,

Defendant-Appellant,

PHE, INC.,

Amicus Curiae.

No. 88-5002

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BARBARA A. PRYBA,

Defendant-Appellant,

PHE, INC.,

Amicus Curiae.

No. 88-5003

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDUCATIONAL BOOKS, INC.,

Defendant-Appellant,

PHE, INC.,

Amicus Curiae.

No. 88-5004

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JENNIFER G. WILLIAMS,

Defendant-Appellant,

PHE, INC.,

Amicus Curiae.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. T.S. Ellis III, District Judge. (CR-87-208-A)

Argued: October 4, 1989 Decided: April 9, 1990

Before RUSSELL, WIDENER, and CHAPMAN, Circuit Judges.

Affirmed by published opinion. Judge Chapman wrote the opinion, in which Judge Russell and Judge Widener joined.

ARGUED: Paul J. Cambria, Jr., LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES, Buffalo, New York, for Appellants. William Graham Otis, Assistant United States Attorney, Alexandria, Virginia, for Appellee. ON BRIEF: Cherie L. Peterson, LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES, Buffalo, New York; Plata Cacheris, CACHERIS & TOWEY, Washington, D.C. for Appellants. Henry E. Hudson, United States Attorney, Alexandria, Virginia, for Appellee. Donald B. Verrilli, Jr., David W. Ogden, Bruce J. Ennis, JENNER & BLOCK, Washington, D.C., for Amicus Curiae.

CHAPMAN, Circuit Judge:

Following a jury trial, appellants were convicted of various offenses relating to the sale of obscene video tapes and obscene magazines. Dennis E. Pryba and Barbara A. Pryba, husband and wife, were each convicted of one count of violating 18 U.S.C. § 1962(a) (participating in a pattern of racketeering activity); one count of violating 18 U.S.C. § 1962(c) (employed by a criminal enterprise engaged in racketeering activities); one count of violating 18 U.S.C. § 1962(d) (conspiracy to violate 1962[a]); and seven counts of violating 18 U.S.C. §§ 1465 and 2 (transportation of obscene materials in interstate commerce for sale and distribution). Jennifer G. Williams was acquitted on Count I, violation of § 1962(a), but convicted of all of the remaining counts. Educational Books, Inc. was convicted of one count of violating 18 U.S.C. § 1962(a) and one count of violating 18 U.S.C. § 1962(d). All defendants appeal their judgments of conviction and they raise constitutional challenges to the forfeiture provisions of the federal RICO statute, the use of the prior state obscenity convictions of Educational Books, Inc. to prove predicate acts of racketeering, and various rulings made by the trial court in the admission of evidence and in the voir dire examination of prospective jurors. After a careful consideration of the record, the briefs, and the oral argument, we affirm.

I

Dennis E. Pryba and Barbara A. Pryba owned corporations which operated nine video rental stores and three bookstores in Northern Virginia. The corporations B & D Corporation and

Educational Books, Inc. operated Video Rental Center Stores which stocked inventories of general audience video tapes and sexually explicit adult video tapes. Although the Prybas owned the stock in the corporations, they were never listed as officers or directors, because Mr. Pryba stated that he wanted to disguise who was actually in charge in the event of trouble with the police. Jennifer Williams was a long-time employee and bookkeeper, and was listed as president of B & D Corporation. She performed numerous services for the corporation, although she argues that her role was so minimal that the proof was insufficient to convict her.

The Video Rental Center Stores also stocked rubber goods, "marital aids," and "peek booths" through which one could view two or three minutes of sexually explicit tape upon payment of a quarter. The heart of the government's case consisted of the introduction of the tapes and magazines that were alleged to be obscene. The indictments were brought following an obscenity investigation during which investigators opened memberships with video retail centers and rented or purchased sexually explicit video tapes and magazines. At trial the jury found six of the nine magazines to be obscene and four video tapes that had been rented or purchased to be obscene. The content of this material is accurately and unemotionally described by the district judge in *United States v. Pryba*, 678 F. Supp. 1225, 1227-28 (E.D. Va. 1988):

> 1. *She-Male Confidential, Bizarre Encounter #9*. This video depicts a variety of sexual activities involving "she-males" — persons who have female bodies, including fully developed breasts. They are women in all respects save one: they have male genitalia. In the first scene, two she-males dressed as women engage in fellatio and anal intercourse with a man. The second vignette depicts a she-male inserting what appears to be a large pipe into a woman's anus. The she-male and the woman also engage in vaginal and anal

> intercourse. The third scene captioned "Spanked by a Stranger," shows a man throwing a she-male to the ground and performing fellatio upon the she-male. The man then has anal intercourse with the she-male.
>
> 2. *Wet Shots*. This video features men and women engaged in vaginal and anal intercourse and oral sex. Many of the scenes involve groups of men and women. The film also contains close-up depictions of male ejaculations on the bodies and faces of others. In one scene, men are shown ejaculating into a glass of liqueur. A woman then drinks the mixture.
>
> 3. *The Girls of the A-Team*. This film, as the title might suggest, is devoted chiefly to showing anal intercourse between men and women, in couples and in groups. The film also depicts a variety of other sexual activities between women in couples and larger groups, including vaginal and anal insertion of a range of objects.
>
> 4. *The Punishment of Anne*. This video predictably has a sado-masochistic theme. A woman and a man subject a younger woman to various forms of degradation, including forcing her to urinate in front of them, photographing her while she is naked and in various positions of bondage, whipping her while she is naked, inserting vegetables into her vagina, putting chains on her and sticking pins into her breasts.
>
> The content of most of the magazines is also sadomasochistic in nature.
>
> 1. *Torment* depicts nude and partially clad women bound and suspended by ropes, chains and straps in contorted positions. Ropes and straps appear frequently in the genital area. Many of the women have tortured expressions on their faces. Welts, whether actual or simulated, appear on some of the women. The accompanying text deals exclusively with bondage and includes descriptions of the sexual pleasure which the sadistic party derives from forcing the victim to endure painful positions of bondage for long periods of time.

2. *In She ... Who Must be Obeyed*, a woman is shown subjecting a nude man to bondage and whipping. Acts of violence to the man's genitals are also vividly depicted.

3. *Bottoms Up* chiefly depicts nude women being spanked with hands and with objects such as canes and whips. The buttocks of several of the women appear to be red and bruised as if flagellation were actually taking place. The stories involve the sexual gratification which both the abusers and victims receive from this bizarre activity.

4. In *Slave Training*, acts of abuse to male and female genitals are shown in cartoons and photographs. In several photographs, mousetraps and tourniquet devices are pictured on women's breasts. One woman's breasts have actually become purple due to tourniquets. The text focuses on various forms of emotional and physical abuse, such as insertion of steel rings into a woman's nipples and caning of a man's penis.

5. *Tied Up* depicts naked and partially clad women in various states of bondage and includes several closeup photographs of women's genitals.

6. Finally, the photographs in *Super Bitch* depict female domination and male submissiveness.

The remaining three magazines contain graphic depictions of female genitals. *Tender Shavers* shows young women shaving their pubic hair and masturbating. Whether some of the models are adults or juveniles is unclear. Bobby socks, ponytails and makeup are employed to underscore, if not create, the appearance of adolescence, presumably to appeal to hedophiles. *Crotches* contains prominent almost clinical, displays of young women's genitals. The accompanying text makes clear that the reader is supposed to believe that the models are teenage girls. The last magazine, *Poppin Mamas*, depicts naked pregnant women in lascivious poses.

The trial judge noted the difficulty of describing the visual impact of this material. At note 3, page 1227, he stated:

> Significantly, the exercise of describing these materials confirmed a fact that played some role in the court's decision on these materials, namely, that language, however rich for some purposes, is simply unequal to the task of conveying to a reader what the visual images convey to the viewer. There is, no doubt, a large difference in communicative impact and effect between the written phrase "homosexual fellatio and anal intercourse" and the vivid depiction of it on video. For example, the latter might well be patently offensive, while the former may not. This difference in sensory impact should be taken into account in making judgments about the relevance and probative value of certain of defendants' proffered evidence.

The proffered evidence of defendants, which the court excluded, involved certain "public opinion surveys," which will be mentioned later in the opinion, and which the court excluded from evidence because they failed to adequately convey to the person being interviewed the true nature of the material in question.

The defendants also proffered an "ethnographic survey," that they maintained reflected the community acceptance of sexually explicit materials, including those described above. This evidence was excluded. None of appellants took the witness stand.

The jury acquitted as to *Super Bitch*, and could not reach a verdict on the magazines *Crotches* and *Poppin Mamas*. *Id.* at 1228 n. 4.

In its verdict the jury found that the video tapes entitled *She-Male Confidential*, *Bizarre Encounter #9*, *Wet Shots*, *Girls of the A-Team*, and *Punishment of Anne* were obscene and that the magazines *Torment*, *She ... Who Must be Obeyed*, *Bottoms Up*, *Slave Training*, *Tied Up*, and *Tender Shavers* were obscene. *Id.*

Following the verdicts of conviction, Dennis Pryba was sentenced to three years imprisonment on Count I, ten years on Counts II and III, and five years each on Counts IV through X. The sentences on Counts II through X are to run concurrently with each other but consecutively to the three year sentence on Count I, but they were suspended in favor of five years probation. Dennis Pryba was also sentenced to pay a fine of $75,000 under Count II, and as a condition to probation following his prison term, he was directed to make monthly payments in satisfaction of unpaid fines previously imposed as a result of state convictions of his businesses.

Barbara Pryba was sentenced to suspended terms of three years imprisonment on Counts I and II and Counts IV through X, and to a suspended sentence of ten years on Count III. She was also sentenced to concurrent terms of three years probation on all counts and fined $200,000.

Educational Books, Inc. was sentenced to pay fines of $100,000 on each of Counts I and III. Jennifer Williams was sentenced to concurrent terms of three years imprisonment on Counts II through X and these terms were suspended and she was placed on probation for three years and fined $2,250.

Following the jury verdicts finding violations of 18 U.S.C. § 1962(a), (c), and (d), the same jury heard an additional week of testimony on the issue of forfeiture under 18 U.S.C. § 1963(a)(1). The jury found that defendants had certain interests in property which afforded them a source of influence over the enterprise and directed that all shares of stock in B & D Corporation, Educational Books, Inc., Marlboro News, Home Video Sales, Inc., and Video Shop, Ltd. be forfeited, together with corporate assets, certain real estate and motor vehicles. Upon this verdict, the court issued an order of forfeiture and the government immediately dispatched United States Marshals to padlock the doors of the three

bookstores and nine video rental shops. The jury spared Mrs. Pryba's home and automobile from forfeiture. Appellants moved to stay the orders of forfeiture, and these motions were denied by the trial court, this court, and the United States Supreme Court.

Appellants argue that the forfeiture order resulted in the confiscation and restraint of a vast inventory of presumptively protected expressive material.[1] They also contend that, for the fiscal year ending September 30, 1986, the total sales of their businesses amounted to more than $2,000,000, and, as a result of the sale and rental of only $105.30 of material found to be obscene the government has shut down 12 expressive businesses by confiscating all of their inventories, including presumptively protected films and magazines.

II

This case represents the first application of federal RICO forfeiture provisions in which obscenity violations are the predicate acts constituting the pattern of racketeering activity under 18 U.S.C. § 1962. Defendants claim that the RICO statute and its forfeiture provisions violate the First Amendment when the predicate offenses are obscenity violations. In the present case, the predicate offenses were the 15 prior obscenity convictions of the corporate defendant, and the sale and/or rental of four video tapes and six magazines, which were subsequently determined to be obscene.

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[1] The government sought to prove by circumstantial evidence that practically all of the appellants' inventory was obscene. This request was denied. *United States v. Pryba*, 674 F. Supp. 1518 (E.D. Va. 1987).

Defendants argue that the RICO forfeiture provisions, as applied to racketeering activity consisting of obscenity violations, are an unconstitutional prior restraint of protected expression, have a chilling effect on constitutionally protected expression, and are overly broad in their application.

There is nothing so unusual about obscenity convictions that they may not be used as RICO predicate offenses. There is no constitutional protection for materials adjudged to be obscene. *Roth v. United States*, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, 1 L. Ed. 2d 1498 (1957) The appellants have no protected right to be free from prosecution for violating the federal obscenity statutes and the Supreme Court, in *Fort Wayne Books, Inc. v. Indiana*, ___U.S.___, 109 S.Ct. 916, 102 L. Ed. 2d 34 (1989), held that substantive obscenity violations could serve as predicate offenses under the Indiana RICO statute which is patterned after the federal RICO statute. There is no merit to the claim that obscenity violations may not be RICO predicate offenses.

III

The constitutionality of criminal sanctions against those who distribute obscene materials is well established. *Pinkus v. United States*, 436 U.S. 293, 98 S.Ct. 1808, 56 L. Ed. 2d 293 (1978); *Splawn v. California*, 431 U.S. 595, 97 S.Ct. 1987, 53 L. Ed. 2d 606 (1977); *Miller v. California*, 413 U.S. 15, 93 S.Ct. 1325, 1 L. Ed. 2d 419 (1973); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957). These sanctions may include imprisonment and fines. *Smith v. United States*, 431 U.S. 291, 97 S.Ct. 1756, 53 L. Ed. 2d 324 (1977) (5 year prison term and $5,000 fine for first offense; 10 year prison term and $10,000 fine for each subsequent violation); *United States v. Guglielmi*, 819 F.2d 451 (4th Cir. 1987), *cert. denied*, 484 U.S. 1019 (1988) (25 year prison term).

Appellants argue that the post-trial forfeiture of their properties following their convictions under RICO constitutes a prior restraint of their protected right of expression under the First Amendment. They contend that RICO forfeiture provisions violate the First Amendment because they lack the procedural safeguards necessary to insure that protected expression is not erroneously suppressed. They rely on *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct 734, 13 L. Ed. 2d 649 (1965), and the three conditions it imposes on any attempt to suppress unprotected expression: (1) the government must bear the burden of proof that the material represents unprotected expression; (2) the exhibitor of the alleged unprotected expression must be assured, by either statute or authoritative judicial construction, of a prompt adversarial hearing and adjudication on the issue of obscenity; and (3) a statute must strictly limit the duration of any prior restraint device entered before judicial review.

Appellants argue that the statutory framework of RICO fails to meet these three requirements, because even though the government must prove at least two prior obscenity violations to establish a pattern of racketeering activity, RICO allows the government to restrain all remaining expressive material by seizure and forfeiture without first demonstrating its obscenity. They further contend that such restraint is not limited in duration, but is permanent, and that there is no judicial review and final adjudication of the forfeited material's obscenity. We do not find *Freedman v. Maryland* particularly helpful to a decision of the present case. It involved the Maryland Movie Censorship Law which required that films be submitted to the State Board of Censors for a license before a public showing. The statute's procedure placed the initial burden upon the exhibitor to prove that the film met the state standard. On our facts, appellants were not subject to a censorship board, they were convicted by a jury of violating obscenity statutes and of engaging in racketeering activities. This was an adversarial proceeding and it established beyond a

reasonable doubt the obscenity of certain of defendants' stock in trade. *Freedman* did not involve, did not discuss, and has no application to RICO forfeitures. It involved a film that by the state's admission was not obscene and did not violate the standards set by the censorship statute.

In 1984 the RICO statute was amended by adding obscenity to the predicate offenses constituting "racketeering activity." Appellants argue that the legislative intent motivating this amendment was the desire to eliminate pornography and obscenity. This intent, coupled with the original intent of the forfeiture provisions of RICO, was to incapacitate a defendant from continuing the activity giving rise to the RICO violation by removing his economic wherewithal to continue. Appellants claim that the forfeitures at issue here have incapacitated them from future expression of any sort as a consequence of past acts of unprotected speech. This, they claim, is forbidden under *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L. Ed. 2d 1357 (1931).

Near is of no assistance. The factual situation and the law involved there were vastly different. In 1925, Minnesota passed a statute to abate, as a public nuisance, the publication of malicious, scandalous and defamatory newspapers, magazines and other periodicals. The law provided that there was available the defense that the truth was published "with good motives and for justifiable ends." Under the law, the County Attorney where the periodical was published or the State Attorney General, upon failure of the County Attorney to proceed, or a private citizen in the name of the state, upon failure of both the County Attorney and the Attorney General to proceed, could commence an action to perpetually enjoin the person committing or maintaining such nuisance from further committing or maintaining it. Near published "The Saturday Press." This publication contained articles stating that certain citizens, law enforcement officers and members of the County Grand Jury were turning a blind eye to gambling, bootlegging and racketeering in Minneapolis. The state court found that the publication was "largely devoted to malicious, scandalous and defamatory articles" within the meaning of the statute. It was held to be a public nuisance. The judgment perpetually enjoined Near from producing, editing, publishing, circulating, having in his possession, selling or giving away any publication which was malicious, scandalous or defamatory, and from conducting a business under the name of The Saturday Press or any other name. The Supreme Court struck down the statute and found it to be "the essence of censorship." *Id.* at 713, 51 S.Ct. at 630. *Near* involved a clear case of both censorship and prior restraint of publications containing news and comment on the news. It is difficult to imagine a situation more clearly protected by the First Amendment. *Near* has no application to obscenity, and sheds no light on the issues before us.

Appellants claim that RICO forfeiture curtails First Amendment rights when the predicate offenses are obscenity violations. However, it is not the predicate offenses that impact on First Amendment rights, but it is the forfeiture that may curtail speech impermissibly. There are specific statutes which establish crimes relating to the sale, transportation and mailing of obscene materials. See 18 U.S.C. §§ 1460-1469. These statutes also provide imprisonment and fines upon conviction, and § 1467 allows criminal forfeiture not only of obscene materials, but also any real or personal property traceable to the proceeds obtained from such offense and/or used to commit or to promote the commission of the offense.

Following the guilty verdicts of the defendants, evidence was presented for a week on the issue of forfeiture. A properly instructed jury unanimously decided upon an adequate record that the defendants owned or had an interest in the proceeds in the properties that were forfeited, and that the properties afforded

defendants a source of influence over the enterprise that the defendants conducted in violation of 18 U.S.C. § 1962.

The forfeiture provided by 18 U.S.C. § 1467 does not violate the First Amendment even though certain materials, books and magazines, that are forfeited, may not be obscene and, in other circumstances, would have constitutional protection as free expression. There was a nexus established between defendants' ill gotten gains from their racketeering activities and the protected materials that were forfeited. The forfeiture did not occur until after defendants were convicted of violating various obscenity statutes and of participating in a racketeering activity, and until after it was established beyond a reasonable doubt that the proceeds from these criminal activities had been used to acquire the arguably protected publications.

The defendants may not launder their money derived from racketeering activities by investing it in bookstores, videos, magazines and other publications. The First Amendment may be used as a shield, but it is not a shield against criminal activity. To follow the defendants' argument would allow criminals to protect their loot by investing it in newspapers, magazines, radio and television stations. Carried to its logical end, this reasoning would allow the Colombian drug lords to protect their enormous profits by purchasing the New York Times or the Columbia Broadcasting System.

Defendants seek support from *Fort Wayne Books, Inc. v. Indiana, supra*, ____U.S.____, 109 S.Ct. 916, 103 L. Ed. 2d 34, but this case is of no assistance to them. It involved the Indiana RICO statute and a civil action which authorized the court, following an ex parte hearing, to order the immediate seizure of a bookstore and its contents which were alleged to be used in the racketeering activity. The Supreme Court found that pretrial seizure of the bookstore and its contents was improper and that the books and films could not be taken out of circulation until there had been a

determination of obscenity after an adversary hearing. Although defendants rely on *Fort Wayne*, it actually forecloses a number of their arguments. In deciding that the Indiana RICO statute, patterned after the federal RICO statute, was not unconstitutional because of the inclusion of substantive obscenity violations among the predicate offenses, the Court held that the use of RICO sanctions in racketeering based upon obscenity violations was not so "draconian" as to have a chilling effect upon First Amendment freedom, *id.* at ____, 109 S.Ct. at 925, and that the greater punishment under RICO was not constitutionally significant when compared with punishment available under obscenity statutes. *Id. Fort Wayne* did not reach the issue of post-trial forfeiture, but emphasized that the materials considered by the court prior to seizure were merely to establish probable cause and concluded that the Indiana procedure did not pass constitutional muster because the seized materials were expressive and presumed to be protected by the First Amendment, and that this presumption was not rebutted "until the claimed justification for seizing books or other publications is properly established in an adversary proceeding." *Id.* at ____, 109 S.Ct. 929. In its final footnote, the majority opinion stated:

> Although it is of no direct significance, we note that the federal government — which has a RICO statute similar to Indiana's, 18 U.S.C. § 1961, et seq. — does not pursue pretrial seizure of expressive materials in its RICO actions against "adult bookstores" or like operations. See brief of United States as amicus curiae, 15, n.12; cf. *United States v. Pryba*, 674 F.Supp. 1504, 1508, n.16 (E.D.Va. 1987).

Id. at ____, 109 S.Ct. 930.

The forfeiture of nonobscene books, magazines and video tapes, after a conviction of racketeering involving the sale of obscene goods and after the jury has determined that the forfeited materials were acquired or maintained in violation of 18 U.S.C.

§ 1962 and afforded the Prybas a source of influence over the racketeering enterprise, does not violate the First Amendment. The fact that some of the materials forfeited are not obscene does not protect them from forfeiture when the procedures established by RICO are followed, as they were in the present case.

Appellants argue that forfeiture of nonobscene materials has a chilling effect on their right of expression. This does not make forfeiture unconstitutional. Both a prison term and a large fine would have a chilling effect on the right of expression, but such penalties are constitutional. The Prybas were exposed to 35 years imprisonment plus a fine of $1,750,000 each without consideration of the RICO count. If imprisoned, their rights of expression would be restricted. It is doubtful that the business could survive fines of the amount authorized by statute, and this would in effect chill the right to sell presumptively protected material. However, this does not make the prison terms or the fines unconstitutional. The same reasoning applies to forfeitures.

This issue was presented in *511 Detroit Street, Inc. v. Kelley*, 807 F.2d 1293 (6th Cir. 1986), which involved the Michigan anti-obscenity law. The court noted a statement from the legislative history: "The best way to curtail dissemination of pornography is to make it unprofitable, hence the bill's provisions for fines of up to $5 million." *Id.* at 1298-99. The district court had found the act to be vague and overly broad and an impermissible restraint on protected speech. However, the circuit court stated:

> Furthermore, the district court concluded that because a sentencing judge may look at total profits, from sales of both protected and obscene materials, in determining the appropriate fine under Section 5, *protected* material will be "penalized", for there will be no judicial determination of just how much of the total profits was derived from dissemination of obscene material.

> We reject this contention. We refuse to hold that a statute threatening fines that could impair the operation of a business is an impermissible prior restraint on expression, even where that business also involves dissemination of protected materials. The fact that a person does some business disseminating protected materials cannot immunize that person from large fines that may be imposed for violation of criminal law.

Id. at 1299.

Appellants have beckoned us into a thicket of constitutional claims, asserting prior restraint, the chilling of free expression, and methods of regulating obscenity that are vague and overly broad, but we decline this invitation. Such an exercise is not necessary to resolve this case. Obscenity is not protected by the First Amendment and a convicted racketeer may not launder his dirty money by investing it in materials that involve protected speech.

IV

The forfeiture of appellants' business assets was not cruel and unusual punishment or an excessive fine prohibited by the Eighth Amendment. In *United States v. Guglielmi*, 819 F.2d 451 (4th Cir. 1987), *cert. denied*, 484 U.S. 1019 (1988), we approved a prison sentence of 25 years and a fine of $35,000 on conviction of five counts of interstate shipment of obscene materials.

Plaintiff argues that forfeiture of their properties upon conviction of their "minor crimes" is disproportionate. Even if we thought a proportional analysis was required, appellants have failed to proffer the information that would be required for such an undertaking. However, such an analysis is not required because appellants did not receive a sentence of sufficient severity to trigger a proportionality review. *United States v. Whitehead*, 849 F.2d 849, 860 (4th Cir. 1988); *United States v. Rhodes*, 779 F.2d 1019, 1027-28 (4th Cir. 1985), *cert. denied*, 476 U.S. 1182

(1986) (*Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 17 L. Ed. 2d 637 (1983) does not require a proportionality review of any sentence less than life imprisonment without the possibility of parole).

V

At trial appellants sought to introduce a public opinion survey conducted through telephone calls by a professor of social sciences and psychology at Luke University. The survey was offered to demonstrate the community's attitude, toleration and standards with regard to sexually explicit materials. They also sought to introduce an "ethnographical" study by another sociologist, who testified that an "ethnological" study "looks at what is going on in the community." After an extended voir dire of these witnesses, the trial judge refused to admit the survey results or the testimony of these experts. After the trial the district court in a very scholarly and detailed opinion set forth his reasons for excluding this evidence. *See United States v. Pryba*, 678 F. Supp. 1225 (E.D. Va. 1988). We adopt the reasoning of the district court and find the claim of error in refusing to admit these studies or this testimony to be without merit.

In *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L Ed. 2d 446 (1973), the court found that the jury needed no assistance from experts on the issue of obscenity once the challenged materials are in evidence. In the present case, the basis of the district court's refusal to admit this evidence was his finding that the questions presented by the pollsters in conducting their surveys did not accurately and fully describe the challenged materials being sold by the appellants. Asking a person in a telephone interview as to whether one is offended by nudity, is a far cry from showing the materials previously described in this opinion, and then asking if they are offensive.

In dealing with the difficult question of describing obscenity, one takes comfort in the statement of Justice Stewart:

> I have reached the conclusion, which I think is confirmed at least by negative implication in the court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L. Ed. 2d 793 (1964) (footnotes omitted).

The jurors in the present case saw the materials and found some of it to be obscene, some of it not to be obscene, and could not unanimously agree on certain materials. We agree with the district judge that the jurors would not have been helped by the proffered testimony.

VI

The right of peremptory challenge is "one of the most important of the rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L. Ed. 208 (1894). However, the refusal of the district court in its extensive voir dire of prospective jurors to ask seven questions of the 117 questions (many with subparts) presented by appellants did not prejudice the appellants in the exercise of their challenges or in the ultimate selection of the jurors.

The trial judge went to great pains in reviewing all of the questions proposed, and found some to be overly intrusive. We do not find that he abused his discretion in this area. "It is well estab-

lished that a trial court may exercise broad discretion in conducting the voir dire of the jury, and particularly in phrasing the questions to be asked." *United States v. Jones*, 608 F.2d 1004, 1007 (4th Cir. 1979), *cert. denied*, 444 U.S. 1086 (1980).

VII

Appellants contend that the trial court improperly admitted into evidence the 15 prior state court obscenity convictions of defendant Educational Books, Inc. Its argument that the government cannot prove predicate acts by state court convictions is without merit. Judge Parker laid this issue to rest almost 60 years ago when our court decided, in *Myers v. United States*, 49 F.2d 230 (4th Cir. 1931), that the evidence that a defendant had pled guilty in state court to possession of liquor found on premises on the day following the alleged sale was properly admitted in a federal court prosecution for the sale. The trial court faced and decided this issue in its well reasoned opinion, *United States v. Pryba*, 680 F. Supp. 790 (E.D. Va. 1988). We find its opinion persuasive and adopt it.

The individual defendants claim that they were prejudiced by the introduction of the records of the 15 state court convictions of the corporate defendant. A careful examination of the record reveals that the trial judge took meticulous care to instruct the jury that the prior convictions of Educational Books, Inc. could only be considered predicate acts as to the corporate defendant. On at least seven occasions the judge explained how these convictions could be used and there could be no doubt in the minds of the jurors on this point.

The individual defendants claim that there was a spill-over effect as a result of the introduction of these prior convictions, but our review of the record does not confirm this. The jury was carefully instructed to consider the evidence separately as to each defendant and as to each count in the indictment. It is obvious

that the jury followed these instructions. It acquitted defendant Williams on Count 1 and acquitted the Prybas on the tax counts.

VIII

We find no merit to appellant Williams' claim that she should have been severed. Persons indicted together should be tried together, *United States v. Brugman*, 655 F.2d 540, 542 (4th Cir. 1981), and the defendant must show that a joint trial would have been so prejudicial as to have resulted in a miscarriage of justice. *Id.* at 542-43. Williams did not make such a showing and it is obvious from the jury's verdict that the charges against her were considered individually: she was acquitted on a charge on which all other defendants were found guilty.

IX

Appellants claim error in the jury instructions because the trial judge charged:

> Contemporary community standards are set by what is, in fact, accepted in the adult community as a whole, and not by what the community merely tolerates and not by what by some groups or persons may believe the community ought to accept or refuse to accept. Obscenity is not a matter of individual taste, and the question is not how the material impresses an individual juror; rather, the test is whether the average adult person of the community would view the material as an appeal to the prurient interest in nudity, sex, or excretion.

Appellants claim the test for obscenity to be a community's toleration for sexually oriented material — what a community will put up with, permit or allow. They seek support of this standard in *Smith v. United States*, 431 U.S. 291, 305, 97 S.Ct. 1756, 1766, 52 L. Ed. 2d 324 (1977):

> Our decision that contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community does not mean, as has been suggested, that obscenity convictions will be virtually unreviewable.

This language is taken from the court's discussion of the test established in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), in which the court enunciated a test for obscene and hard core pornography materials. Under this test the jury must decide (a) whether the average person applying contemporary community standards would find that the work, taken as a whole, appealed to prurient interests; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller* involved a state statute, but the test has been found equally applicable to federal legislation. *United States v. 12 200 Foot Reels of Film*, 413 U.S. 123, 129-130, 93 S.Ct. 2665, 2670, 37 L. Ed. 2d 500 (1973); *United States v. Orito*, 413 U.S. 139, 145, 93 S.Ct. 2674, 2679, 37 L. Ed. 2d 513 (1973); and *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L. Ed. 2d 590 (1974). *Miller* does not mention "acceptance" or "toleration" in discussing contemporary community standards.

To consider community toleration as synonymous with what a community will put up with skews the test of obscenity and invites one to consider deviations from community standards, because a community can be said to put up with a number of disagreeable circumstances that it cannot stop. The District of Columbia had over 350 murders in 1989, but to say that the citizens "tolerated" this epidemic of homicides would misuse the word. While the City of Washington may not be able to eradicate murder, it can stop the sale of obscenity by assuming the burden of prosecuting those engaged in this crime.

To take the word "tolerance" out of one sentence in and insist that it be used as the test for contemporary community standards misreads the opinion. It is ironic that the word "toleration" should be taken from one part of the opinion, while the opinion clearly states that "the court instructed the jury that contemporary community standards were set by what is in fact accepted in the community as a whole." 431 U.S. at 297-98, 97 S.Ct. at 1762.

The use of tolerance as the correct test was rejected by the Fifth Circuit in *Hoover v. Byrd*, 801 F.2d 740 (5th Cir. 1986), when the court stated:

> Petitioner's insistence that "tolerance" must be substituted for "decency" affronts the notion of "standards," because tolerance embodies the permissible *deviations* from standards. As was shown above, the *Miller* definition of obscenity, taken as a whole, narrowly circumscribes the arena of state regulation to depictions or descriptions of sexual conduct which per se deviate from those of the community at large. Moreover, as *Miller* and *Smith* emphasize, obscenity is to be judged by *community* standards, which requires the jury to consider the average person rather than the most prudish or most tolerant. *Smith*, *supra*. To incorporate a requirement of "tolerance" within the definition of "community standards" not only turns the notion of standards upside down, but it also undermines the goal of *Miller* to permit differing levels of obscenity regulation in ... diverse communities.

801 F.2d at 741-42 (emphasis in original).

We find no error in the jury instructions for failing to charge on community toleration.

X

Appellants claim error in the jury instructions relating to the RICO conspiracy count, and they argue that, to convict, the government must prove that a defendant personally agreed to commit two or more specified predicate crimes. On this point the district judge charged that, to convict a defendant of RICO conspiracy, the government must prove:

> [T]hat each defendant agreed to personally commit or aid and abet two or more acts of racketeering in violation of Section 1962(a) or that each defendant agreed that another coconspirator would commit two or more acts of racketeering in violation of 1962(a).

Appellants argue that this language allows a conviction even if the jury failed to find that the defendant personally agreed to commit the two or more predicate acts; however, to adopt appellants' argument would require that RICO conspirators be involved in the affairs of a conspiracy to a greater extent than required in other conspiracies. The heart of a conspiracy is the agreement to do something that the law forbids. There is no requirement that each conspirator personally commit illegal acts in furtherance of the conspiracy or to accomplish its objectives. To adopt appellants' position would add an element to RICO conspiracy that Congress did not direct, and this would be contrary to the majority of circuits which have decided the issue. *United States v. Rosenthal*, 793 F.2d 1214, 1228 (11th Cir. 1986) ("Finally, there is no requirement that each defendant must have agreed to commit two predicate acts of racketeering activity. *United States v. Carter*, 721 F.2d 1514, 1528-31 (11th Cir. 1984). The government need only prove that each defendant conspired to commit the substantive RICO offense and was aware that others had done likewise."); *United States v. Neapolitan*, 791 F.2d 489, 498 (7th Cir. 1986) ("Nothing on the face of the statute or its

legislative history supports the imposition of a more stringent level of personal involvement in a conspiracy to violate RICO as opposed to violate anything else. In fact, it seems more likely that Congress, in search of means to prosecute the leaders of organized crime, intended Section 1962(d) to be broad enough to encompass those persons who, while intimately involved in the conspiracy, neither agreed to personally commit nor actually participated in the commission of the predicate crimes."); *United States v. Joseph*, 781 F.2d 549, 554 (6th Cir. 1986) ("We reach a different conclusion with respect to the conspiracy count, 18 U.S.C. § 1962(d). For a conspiracy conviction it is not necessary to prove that the defendant agreed to personally commit the requisite acts, but only that he agreed that another violate § 1962(c) by committing two acts of racketeering activity."); *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir. 1985) ("we now decide that to be convicted of a RICO conspiracy, a defendant must agree only to the commission of the predicate acts, and need not agree to commit personally those acts."); *United States v. Tille*, 729 F.2d 615, 619 (9th Cir.), *cert. denied*, 469 U.S. 845 (1984) ("The statutory language, however, does not require proof that a defendant participated personally, or agreed to participate personally, in two predicate offenses. Read in context, section 1962(d) makes it unlawful to conspire to conduct or participate in the conduct of an enterprise's affairs, where its affairs are conducted through a pattern of racketeering activity."); *see also United States v. Kragness*, 830 F.2d 842, 859 (8th Cir. 1987).

The First and Second Circuits have adopted appellants' view in *United States v. Ruggiero*, 726 F.2d 913 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984) and *United States v. Winter*, 663 F.2d 1120 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983). The language in *Winter* relating to the agreement to commit the predicate acts personally was dictum. *Ruggiero* was the first case to decide this issue and its reasoning has not persuaded other circuits, and it does not persuade us. RICO conspiracy does not require that

each coconspirator personally agree to commit two or more acts of racketeering in violation of § 1962(a).

XI

We find no merit to the claim of appellant Williams that the evidence was insufficient to sustain her convictions. She claims that she was just a front person and had no control over the businesses. However, the evidence was sufficient to establish the fact that she held all offices in the corporations, that she kept the books, that she was a long time employee, that she hired at least one employee and directed others in their work. There was ample evidence to support a finding that she was aware of the sexually explicit nature of the materials that the corporations were selling and she worked on a daily basis in the warehouse where these materials were stored. This was substantial evidence from which reasonable jurors could find her guilty as charged.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5001(L)

United States of America,

Plaintiff-Appellee,

versus

Dennis E. Pryba, et al,

Defendants-Appellants.

ORDER

The Court amends its opinion filed April 9, 1990, as follows:

On page 3, section 4, line 7 — "Lawrence J. Leiser, Assistant United States Attorney," is added as counsel for Appellee.

For the Court — By Direction

/s/ John M. Greacen

CLERK

Filed: May 1, 1990

David C. Schopp, Esq.
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Buffalo, NY 14202

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5001(L)

United States of America,

Plaintiff-Appellee,

versus

Dennis E. Pryba,

Defendant-Appellant,

PHE, INC.,

Amicus Curiae.

ORDER

Upon consideration of appellants' motion for stay of mandate pending application to the Supreme Court of the United States for writ of certiorari,

IT IS ORDERED that the motion for stay of mandate is granted for a period of 30 days to permit the defendants to apply for certiorari.

Entered at the direction of Judge Chapman with the concurrence of Judge Russell and Judge Widener.

For the Court,

/s/ John M. Greacen
CLERK

Filed: 05/01/90

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18 U.S.C. §1465. Transportation of Obscene Matters for Sale or Distribution

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

18 U.S.C. §1961. Definitions

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic

or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), Sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or

motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

18 U.S.C. §1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. §1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law —

(1) Any interest the person has acquired or maintained in violation of section 1962;

(2) Any —

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise the person has established, operated, controlled,

conducted, or participated in the conduct of in violation of section 1962; and

(3) Any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes —

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection *(1)* that he is a bona find purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section —

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that —

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has

not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of

the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to —

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to —

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeit-

ures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection *(1)*, no party claiming an interest in property subject to forfeiture under this section may —

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hear-

ing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that —

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraphs (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(n) If any of the property described in subsection (a), as a result of any act of omission of the defendant —

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

MEMORANDUM OPINION

Introduction

This twelve count RICO-obscenity prosecution is the latest chapter in the continuing First Amendment-pornography saga.[1] The new twist here is the use of RICO,[2] indeed apparently the first federal prosecutorial use of RICO against purveyors of allegedly obscene materials.[3] Until 1984, federal prosecutors targetting smut had an arsenal limited chiefly to 18 USC §§ 1461 *et seq.* Then, in 1984, Congress expanded RICO to cover obscene materials. It did so based on a concern that organized crime was contributing to and profiting from an "explosion in the volume and availability of pornography in our society."[4] As a result, federal prosecutors may now use RICO's stiffer penalties and forfeiture

1 *See generally* F. Schauer, The Law of Obscenity (1976).

2 Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1984).

3 State prosecutions under state RICO statutes apparently antedate federal efforts. *See 4447 Corp. v. Goldsmith*, 479 N.E.2d 578 (Ind. App. 1985), *vacated*, 504 N.E.2d 559 (Ind. 1987); *Arizona v. Feld*, No. 148389 (Ariz. Ct. App. 1987); *Western Business Sys., Inc. v. Slaton*, 492 F.Supp 513 (N.D.Ga. 1980) (applying Georgia RICO statute).

4 130 Cong. Rec. 5434 (Jan. 30, 1984) (remarks of Senator Helms); *Russello v. United States*, 464 U.S. 16, 26 (1938) (RICO's "purpose is to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.").

provisions[5] against sellers and distributors of allegedly obscene materials. This case is just such an attempted prosecution and this Memorandum considers and decides several dispositive threshold motions made by defendants.

Roth v. United States, 354 U.S. 476 (1957) and *Miller v. California*, 413 U.S. 15 (1973) are perhaps the most important of the earlier chapters in the first Amendment-pornography saga. *Roth* made unmistakably clear that obscenity was not constitutionally protected speech and provided a standard by which to discern obscenity, namely whether the average person,[6] applying contem-

5 RICO's criminal penalties provide that whoever violates any provisions of RICO "shall be fined not more than $25,000 or imprisoned not more than twenty years, or both." 18 U.S.C. § 1963(a) (1982 & Supp. 1984).

RICO's forfeiture provisions provide that a person convicted of a RICO offense shall forfeit to the United States:

(1) any interest the person has acquired or maintained in violation of section 1962 ["Prohibited activities"];

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

18 U.S.C. § 1963(a)(1984).

6 In deciding whether the material appeals to a prurient interest, the jury must avoid subjective personal or private views. The average person is the *judge* and not the object of the test. The jury must evaluate what judgment will be made by a hypothetical average person applying the collective view of the adult community. *Pinkus v. United States*, 436 U.S. 293, 300-01 (1978). The Court in *Pinkus* held that "children are not to be included ... as part of the 'community.' " *Id.* at 297; *see also Brockett v. Spokane Arcades*, 105 S.Ct. 2794 (1985). In addition, there is no requirement that the average person be sexually aroused or excited by the material. *United States v. Gugliemi*, 819 F.2d 451 (4th Cir. 1987).

porary community standards,[7] would find that the work, taken as a whole, appeals to the prurient interest.[8] This test predictably spawned more than a decade of spirited and confusing decisions.

In 1973, in an effort to redirect the course of the law in this area, the Court, in *Miller v. California*, rephrased and expanded the Roth test.[9] Justice Brennan, who as the author of *Roth* had arguably initiated this judicial odyssey,[10] was so disillusioned by the 15 or so years of judicial wanderings under *Roth* that at length, he

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[7] The "contemporary community standard" is to be applied by the jury *only* when examining the first two prongs of *Miller*, namely the "prurient appeal" and "patent offensiveness" prongs. *See infra* note 22 (discussing the three-prong *Miller* test). The third prong of *Miller*, the "serious literary, artistic, political, or scientific value" prong, is determined not by the application of the contemporary community standard, but rather by the traditional "reasonable man" standard. *See Pope v. Illinois*, 107 S.Ct. 1918 (1987).

[8] In *Roth v. United States*, 354 U.S. 476 (1957), the Court defined "prurient interest" as follows:

> A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. ...

Id. at 487 n.20. It is evident that the Court saw no significant difference between the A.L.I. Model Penal Code definition of "prurient" (shameful or morbid), and the meaning of "prurient" as it had been developed in the case law (lustful and lascivious) up to 1957. It is worth noting that the comments to the Model Penal Code make it clear that "prurient" is not limited to "shameful" or "morbid", but encompasses a broader use of those terms.

[9] *Miller* clarified the law in several respects, including principally (a) the abandonment of the "utterly without redeeming value" standard announced in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), and (b) the rejection of a national standard for the community. The former imposed an unrealistic burden on the prosecutor, while the latter simply made the common sense point that citizens of Virginia or Wisconsin may well not be willing to find acceptable depictions of sexual conduct that would be acceptable to citizens of Las Vegas or New York.

[10] Some choose to trace the original of the saga to *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) which originated the "fighting words" doctrine and listed obscenity among the types of speech unprotected by the First Amendment.

dissented in *Miller* and its companion case, preferring instead an absolutist, "anything goes" approach to obscenity. Chief Justice Burger, on the other hand, persuaded a majority in *Miller* to carry on and refine the *Roth* effort to draw a line between obscenity and protected speech. Given that the instant case is the latest chapter in this saga, it is perhaps only fitting that the juxtaposed views of Justice Brennan and Chief Justice Burger serve here as a preface.

Thus, in dissenting in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), a *Miller* companion, Justice Brennan noted that the effort to distinguish between protected and unprotected sexually oriented material, born of *Roth*, had proved so vexing, so time-consuming, and so divisive and had generated such disharmony of views[11] that the effort should be abandoned. As he put it, even after all this effort, the subject stubbornly "remained ... resistant to the formation of stable and manageable standards." 413 U.S. at 73.[12] Chief Justice Burger disagreed, noting in *Miller* that the convenient, anything goes, absolutist approach is not the law and that the "Court must face up to the tough problem of constitutional judgment involved in every obscenity case." 413 U.S. at 29-30 (quoting *Roth*, 354 U.S. at 498). So in the spirit of the former Chief Justice's words, this court now faces up to "the tough problems of constitutional judgment" raised in this novel obscenity case.

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[11] The best known, most memorable, and arguably, most candid comment made on the post-*Roth* the line-drawing difficulties in obscenity cases was Justice Stewart's in a concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). He noted that the hard core pornography that was unprotected under the Constitution might be impossible to define but, he said, "I know it when I see it." *Id.* at 197.

[12] Justice Harlan was moved to describe as "intractable" the judgment required and the problems raised in obscenity litigation. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 704 (1968) (Harland, J., dissenting).

The Indictment

The indictment consists of twelve counts plus a number of RICO forfeiture allegations. Of the twelve counts, three allege RICO obscenity violations, while the nine remaining counts charge felony obscenity violations under 18 U.S.C. §§ 1461 *et. seq*. The motions considered in this Memorandum Opinion focus solely on the three RICO counts and the accompanying forfeiture allegations.

Count I charges defendants, Dennis E. Pryba, Barbara A. Pryba, Jennifer G. Williams and Educational Books, Inc., with participating as principals in a "pattern of racketeering" involving the sale and distribution of allegedly obscene materials and with investing the proceeds of such activities in an "enterprise" engaged in interstate commerce, in violation of 18 U.S.C. § 1962(a). The enterprise is said to consist of the Prybas, Williams, Educational Books and seven unindicted corporations.

Count II alleges that Pryba and Williams, as persons employed by and associated with the enterprise, violated 18 U.S.C. § 1962(c) by conducting the affairs of the enterprise through a pattern of racketeering activity. And in Count III, the Prybas, Williams and Educational Books are charged with a Section 1962(c) conspiracy to violate section 1962(a).

Defendants mount a two-prong attack on the RICO counts in the indictment. First, defendants argue three pleading points. Defendants assert that Counts I, II and III do not properly plead an "enterprise", as required by RICO. Next, the defendants claim that the government has not sufficiently alleged a pattern of racketeering activity. Finally, one defendant, Educational Books, asserts that it must be dismissed from Count III because a corporation cannot be guilty of conspiring with its agents when the agents are alleged to have used the corporation to carry out their own purposes. Second, they contend these counts should be dismissed because the RICO's forfeiture provisions run afoul of the Constitution when applied to allegedly obscene materials.[13] Specifically, defendants allege that RICO's forfeiture provisions: (1) have a "chilling" effect upon the distribution of protected speech; (2) act as a prior restraint on protected speech; (3) are unduly harsh and thus violate the Eighth Amendment; (4) violate due process principles; and (5) violate the *ex post facto* clause of the Constitution. Each of these contentions is separately treated.

Facts and Proceedings to Date

Defendants, Dennis E. Pryba, Barbara A. Pryba, Jennifer G. Williams, and Educational Books, Inc., own and operate or assist in operating a number of retail video stores that sell allegedly obscene material. On August 13, 1987, defendants were indicted on various counts under federal RICO alleging, *inter alia*, a pattern of racketeering activity involving dealing in obscene matter.[14]

On August 13, 1987, an *ex parte* restraining order was issued that enjoined defendants from selling, encumbering, or in any other way disposing of certain property that might be forfeitable

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[13] This court is not faced with the question of whether the restraining order is unconstitutional. This matter was addressed and decided by another Judge of this Division when defendants moved to dismiss the restraining order on September 4, 1987.

[14] RICO was amended in 1984 to include "dealing in obscene matter" as a racketeering activity.

> "Racketeering activity" means any act or threat involving ... dealing in obscene matter. ... which is chargeable under state law and punishable by imprisonment for more than one year....

18 U.S.C. 1961(1)(A).

under RICO's forfeiture provisions.[15] In addition, the August 13 restraining order prohibited defendants from selling all video tapes, magazines, and other printed material. This order, however, was modified on August 25, 1987. The modified order permitted defendants to continue to conduct their business as normal "without substantially dissipating or diminishing the value of the assets" of their business or property.[16]

The Pleading Issues

A. The RICO "Enterprise"

Defendants argue that the enterprise alleged in the indictment does not meet the statutory definition. The alleged enterprise consists of individuals and corporations. In defendant's view, the statutory definition of "enterprise" precludes lumping together individuals and corporations. See 18 U.S.C. § 1961(4). Defendants claim that only enterprises composed solely of individuals or solely of other entities are statutorily permitted. The RICO counts of the indictment are thus said to be fatally defective. The Court disagrees; defendant's reading of the statute does violence

[15] The restraining order provided, in part, that defendants were prohibited from disposing of certain real property, automobiles, bank accounts, stocks, and other personal property that might be forfeitable under RICO. Title 18 U.S.C. § 1963(a) provides for three types of forfeiture: (1) any interest acquired or maintained in violation of § 1962; (2) any property affording a source of influence over the enterprise; and (3) any property derived from the proceeds of racketeering activity. If defendants are found to be guilty of dealing in obscene matter, then the real and personal property described in the restraining order might be forfeitable under section 1963(a).

[16] The modified order, dated August 25, 1987, provided that defendants "shall be permitted to conduct [their] business as normal without substantially dissipating or diminishing the value of the assets of the property described ... in the original restraining order." Defendants were permitted to carry on their business using a specific bank account.
The modified order also permitted defendants the use of funds for "reasonable attorneys' fees." The Court has instructed defense counsel to maintain a careful accounting of all fees received.

to the plain meaning of the statutory definition of "enterprise" and, moreover, is contrary to well-reasoned authority.

Section 1961(4) states that " 'enterprise' *includes* any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity" (emphasis added). This is sweeping language; there is no reason to give it a strained, restricted scope. Legislative history confirms this. The House RICO report stated that "enterprise" included

> associations in fact, as well as legally recognized associative entities. Thus infiltration of any associative group by *any individual or group capable of holding a property interest* can be reached.

House Rep. No. 91-1549, 91st Cong., 2d Sess., 1970 U.S. Code Cong. & Ad. News 4007, 4032 (emphasis added).[17] The Supreme Court, in another context, has also recognized the expansiveness of the term "enterprise". In *United States v. Turkette*, 452 U.S. 576 (1981), the Court rejected an argument that "enterprises" should be limited to legitimate business. In reaching this conclusion, the Court noted, "Congress opted for a far broader definition of the word 'enterprise.' "[18] It also stated that "[t]here is no restriction upon the associations embraced by the definition [in § 1961(4)]."[19]

[17] For further discussion of RICO's legislative history and purpose, see *United States v. Turkette*, 452 U.S. 576, 588-93 (1981) (confirming that Congress intended to give broad scope to the term "enterprise").

[18] *Turkette*, 452 U.S. 576, 593 (1981) (RICO "enterprises" not limited to legitimate business; enterprises may include illegitimate as well as legitimate businesses).

[19] *Id.* at 580. This may be a modest overstatement as it appears unlikely that a state or municipality itself may not be of an enterprise. *See United States v. Mandel*, 415 F.Supp. 997 (D. Md. 1976), *supplemented*, 415 F.Supp. 1025.

To accept defendants' argument that the term "enterprises" does not embrace individuals together with other entities, this Court would have to ignore the plain meaning of the word "includes" and find that Congress used the word to indicate that the list following was exhaustive, not merely illustrative. Nothing warrants such a construction; plain meaning and legislative intent are to the contrary, as is the sparse, but well-reasoned and uniform existing authority. The Fifth Circuit in *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982), *cert. denied*, 459 U.S. 825 (1982) succinctly dealt with this point. It stated:

> Appellants contend that because the indictment described the enterprise as "a group of individuals associated in fact with various corporations," the enterprise alleged did not fall within the literal bounds of the statutory classifications. We reject this claim.
>
> * * *
>
> We are convinced ... that RICO covers the enterprise alleged in this case. Use of the verb "includes" in the statutory definition indicates congressional intent not to limit a RICO enterprise to the specific categories listed; rather, the language "reveals that Congress opted for a far broader definition of the word 'enterprise'."

665 F.2d at 625 (quoting *United States v. Turkette*, 452 U.S. 576, 593 [1981]). The Third Circuit reached the same result, noting that:

> We see no indication that Congress intended to restrict the definition of "enterprise" to a number of entities or individuals that all fall within the same category.

United States v. Aimone, 715 F.2d 822, 828 (3d Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984).[20]

Defendants argue that a different result should obtain here because the Fourth Circuit in *United States v. Computer Sciences Corp. [CSC]*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), commands that the rule of lenity applies in RICO cases and thus "includes" must be construed strictly. The case and the rule are inapposite here. *CSC* dealt with a point not here presented. It held that an unincorporated division of a corporation could not be lumped with the corporation to form an "enterprise." *CSC* did not address the argument of these defendants. Further, while the rule of lenity undoubtedly applies in RICO cases *in appropriate circumstances*, those circumstances are not present here. This is not a case where fairness and notice militate in favor of construing an ambiguity with leniency toward a defendant; rather, this is a case where the plain and ordinary meaning of the term "includes" does not fairly admit to the construction defendants' urge.

In sum, *CSC* is inapposite here. The plain meaning of the language defining "enterprise," the legislative history of the provision, and all the pertinent authority to date support this Court's conclusion that a RICO enterprise can consist of individuals lumped together with corporations or other legal entities.

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[20] *See also United States v. Huber*, 603 F.2d 387, 392-94 (2d Cir. 1979), *cert. denied*, 445 U.S 927 (1986) ("enterprise" can include more than one corporation).

B. Pattern of Racketeering Activity

Defendants argue that the three RICO counts do not sufficiently allege the requisite "pattern of racketeering activity."[21] In essence, defendants argue that the activity alleged in the indictment constitutes a single scheme, not separate acts. This indictment, they claim, is analogous to the one at issue in *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149 (4th Cir. 1987). There the issuance of a fraudulent prospectus was held to be a single, unitary scheme, not a RICO pattern of racketeering.

Defendants' argument is unpersuasive. *Zepkin* is not in point. In contrast to the issuance of a prospectus, this indictment alleges a series of separate but related acts dealing with the sale and distribution of obscene material. The allegations fit squarely within RICO, which defines a "pattern" as "at least two acts" and "racketeering activity" as including "dealing in obscene matter." 18 U.S.C. § 1961(5), (1)(A). The following legislative history from the RICO Senate Report dispels any doubt that this indictment properly pleads a pattern of racketeering:

> The target of [RICO] is ... not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.

S. Rep. No. 617, 91st Cong., 1st Sess. 158 (emphasis added), *quoted in Sedima, S.P.R.L. v. IMREX Co., Inc.*, 473 U.S. 479, 496 n.14 (1985). The Fourth Circuit interprets this language to require that "the predicate acts must be related and must be a part of a continuous criminal endeavor." *Zepkin*, 812 F.2d at 154. This indictment, therefore, properly pleads a "pattern of racketeering activity."

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[21] *See* 18 U.S.C. § 1961(1),(5), 1962(a),(c).

C. Conspiracy

The corporate defendant, Educational Books, Inc., asserts that Count III deserves dismissal because, contrary to the indictment's allegations, the corporation cannot conspire with its own agents. In essence, this defendant urges the application in this context of the civil intracorporate conspiracy rule. *See McIntyre's Mini Computer Sales Group, Inc. v. Creative Synergy Corp.*, 644 F. Supp. 580, 585 (E.D.Mich. 1986). Dispositive of this claim is that an exception to the intracorporate conspiracy exists in the criminal arena. *See, e.g., United States v. Peters*, 732 F.2d 1004, 1008 (1st Cir. 1984).

The Constitutional Issues

A. Chilling Effect of RICO

Defendants claim that RICO chills protected speech for two reasons: first, it is said that purveyors will be deterred from dealing in non-obscene erotic literature given the breadth and vagueness of the underlying criminal offense, *i.e.*, obscenity. Second, it is urged that RICO's forfeiture provisions are so draconian as to deter dealers from dealing in protected speech at the margin. In other words, vague definitions of obscenity force purveyors to guess about the status of some "speech" at the margins, and they will be deterred from such guessing by the risk of criminal prosecution and the severity of potential sanctions. The victim, defendants contend, will be protected speech at the margins,

presumably erotic works that skirt the boundary but do not cross over into the realm of obscenity.[22]

The gravamen of both prongs of this attack is the alleged excessive vagueness and breadth of the statutory proscriptions, one state (Va. Code Ann. § 18.2-372), one federal (18 U.S.C. § 1461 *et seq.*), that are the predicates for a RICO violation. The short answer is that both statutes have already passed constitutional muster. They have been found to give "adequate warning of the conduct proscribed" so as to permit the law to be fairly administered. *See Roth v. United States*, 354 U.S. 476, 491 (1957).

The federal obscenity statute, 18 U.S.C. § 1461 *et seq.* and its predecessors, has passed constitutional muster more than once.[23] The same is true of the Virginia analog, Va. Code Ann.

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[22] The existing border demarcating the line between protected speech and obscenity is given by *Miller v. California*, 413 U.S. 15 (1973). Speech may be banned as obscene where:

(a) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(b) the work describes, in a patently offensive way, sexual conduct defined by the applicable state law; and

(c) the work, taken as a whole, lacks serious literary, political, or scientific value.

413 U.S. at 24. Thus, as *J.R. Distributors, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984), *rev'd on other grounds sub nom. Brockett v. Spokane Arcades*, 105 S.Ct. 2794 (1985) indicates, works that merely arouse normal sexual responses (in contrast to shameful or morbid sexual responses) may be constitutionally protected even if they contain an isolated example of a patently offensive description of sexual conduct and even if the works lack redeeming value defined in *Miller*. *Eikenberry*, 725 F.2d at 490-92. It is, presumably, this speech that is at risk at the margin.

[23] *Smith v. United States*, 431 U.S. 291 (1977); *Hamling v. United States*, 418 U.S. 87 (1974); *see, e.g., Roth v. United States*, 354 U.S. 476, 491 (1957).

§ 18.2-3774.[24] Both frame offenses in language that "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices ..., give[s] adequate warning of the conduct proscribed and mark the 'boundaries sufficiently distinct for judges and juries fairly to administer the law.' " *Roth v. United States*, 354 U.S. at 491-92 (1957) (*quoting United States v. Petrillo*, 332 U.S. 1, 7-8 (1947)). To be sure, there may be some fuzziness at the boundaries, but absolute precision is neither practical nor constitutionally required.

> That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense....

Roth, 354 U.S. at 491-92. Defendants' First Amendment chilling argument is, therefore, unfounded insofar as it rests on the alleged vagueness of the underlying obscenity statutes. Both are adequately precise.

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[24] There can be little doubt of the constitutionality of the Virginia statute as its language tracks closely the three part test announced in *Miller v. California*, 413 U.S. 15 (1973). The constitutionality of an earlier, less precise version was upheld in *Grove Press, Inc. v. Evans*, 306 F.Supp. 1084 (E.D.Va. 1969); *see also Educational Books, Inc. v. Commonwealth*, 223 Va. 392, 323 S.E.2d 84 (1984).

A somewhat different question is presented by the application of RICO forfeiture remedies in obscenity prosecutions. So draconian are they, the defendants claim, that the unconstitutional chilling that occurs is tantamount to a prior restraint.[25] The court turns next to this argument.

B. Prior Restraint

Defendants argue that RICO's forfeiture provisions (18 U.S.C. § 1963) operate in alleged obscenity cases, as here, as impermissible prior restraints. Heavy reliance is placed on *Near v. Minnesota*, 283 U.S. 697 (1931) and its progeny which make unmistakably clear the courts' hostility toward prior restraints.

The flaw in this argument is the recognized distinction between prior restraints and subsequent punishment. The evil of a prior restraint is that speech is suppressed before its status is judicially determined. Such restraints are far more likely to chill, indeed to suppress, free speech than subsequent punishment, which can be imposed only after there is the procedural safeguard of a disinterested judicial determination concerning the alleged illegality. A person is punished for speech-related conduct only after he is given the opportunity to litigate, *inter alia*, the constitutionality of the statute, either facially or as applied to him. In obscenity cases, he is also permitted to present the material to a jury and attempt to persuade it, under *Miller*, that the material deserves constitutional protection. Prior restraints deprive "speakers" of these important safeguards. Thus it is that prior restraints are disfavored and come into court "bearing a heavy presumption against ... [their] constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).[26] Such restraints operate to compel a "speaker" to forego his First Amendment rights.

[25] A "prior restraint" is defined as "the imposition of a restraint on a publication before it is published." Black's Law Dictionary 1074 (5th ed. 1979). Courts often use the terms "prior restraint" and "chilling effect" interchangeably. *See, e.g., Arizona v. Feld*, No. 148289 (Ariz. Ct. App. 1987). Yet "chilling effect" refers to the distribution of material, not publication. Although a statute may not amount to a prior restraint on publication, it may cause a chilling effect on distribution. *See United States v. John Doe (Model Magazine)*, No. 86-5159 (4th Cir. Sept 24, 1987).

This is not to say that subsequent punishment schemes such as RICO's forfeiture scheme have no chilling effect whatever. Surely it has some; indeed, it is designed to accomplish just that end. But this "chilling" is a wholly legitimate consequence of the RICO forfeiture provisions or any other criminal penalty.[27] Deterrence (or chilling) through the threat of prosecution and punishment is a legitimate goal of the criminal law. Once it is decided that obscenity does not merit First Amendment protection and indeed, once it is decided that obscenity is so pernicious that it should be criminally proscribed, then a subsequent punishment, like RICO's forfeiture scheme, is a sensible and wholly legitimate law enforcement weapon. It is specially designed to chill or deter proscribed, unprotected speech; unconstitutional chilling occurs

[26] It is worth noting that judicial antipathy toward prior restraints does not mean that all such restraints are *per se* unlawful. Even *Near* recognized there might be "exceptional cases" in which a prior restraint might be lawful. The Court gave as examples publication of sailing dates of naval ships and the number and location of troops. 283 U.S. at 716; *see also Freedman v. Maryland*, 380 U.S. 51 (1965) (occasions exist where prior restraint may be imposed so long as the censor's judgment is subject to immediate court scrutiny).

[27] One commentator argues the contrary. *See* Mayton, *Toward A Theory of First Amendment Process: Injunction of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 Cornell L. Rev. 245 (1982). *But see Redith, The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va. L. Rev. 53 (1983).

only if the definition of obscenity is excessively broad or vague so that some protected speech is unintentionally ensnared in the imprecise net that is cast.[28]

Nor is it significant that the forfeiture penalty may impact adversely on defendants' future speech. That fact alone does not mean that the First Amendment is implicated. The Constitution does not forbid punishment for a crime simply because that punishment might affect free expression. As the Court in *Acara v. Cloud Books*, 106 S.Ct. 3172, 3178 (1986) pointed out,

> book selling is an establishment used for prostitution [or distribution of obscene materials] does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises.

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28 Defendants cite *J.R. Distributors, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984), *rev'd on other grounds sub nom. Brokett v. Spokane Arcades*, 105 S.Ct. 2794 (1985), in support of their claim that RICO punishes protected speech. There, the Ninth Circuit held unconstitutional a state statute that permitted a fine to be imposed against a defendant found guilty of dealing in obscene matter. Such a fine was to be based, in part, on profits made from the sale of protected as well as unprotected material. The court applied "the familiar requirement that statutes punishing expressive conduct 'must be carefully drawn ... to punish only unprotected speech and not be susceptible of application to protected expression.'" *Id.* at 494 (quoting *Gooding v. Wilson*, 405 U.S. 518, 522 (1972)). Yet, *Eikenberry* is inapposite. There, no nexus was required between the sale of obscene matter and protected speech. A defendant could be fined for the profits made on protected matter simply because obscene material was also sold in the same place of business. RICO forfeiture, however, requires a nexus between the sale of obscene matter and protected material. Profits from the sale of protected material may be forfeited only if they are traceable to the sale of obscene matter. Thus, RICO does not punish the sale of protected speech; rather, the provisions act *in personam* to punish a guilty defendant. "[P]roperty forfeitable under RICO need not be 'guilty.' RICO forfeiture is aimed at divorcing guilty persons from the enterprises they have corrupted." *United States v. Cauble*, 706 F.2d 1322, 1350 (5th Cir. 1983).

In summary, an attack on the RICO forfeiture provisions as a prior restraint misses the mark.[29] Subsequent punishments are simply not prior restraints. They are applied only after the due process of a criminal trial and whatever chilling effect they may have is legitimate and intended.[30]

Only meager authority exists on the constitutionality of RICO or RICO-type forfeiture provisions in obscenity cases. What does exist, however, supports this court's conclusion that RICO's forfeiture provisions do not operate to offend the First Amendment in obscenity cases. The sole federal case is *Western Business Systems, Inc. v. Slaton*, 492 F.Supp. 513 (N.D.Ga. 1980), which rejected a claim that Georgia's RICO forfeiture provisions constituted an impermissible prior restraint on protected speech. There, plaintiffs, purveyors of sexually explicit material, sought to enjoin prospective obscenity prosecutions under the Georgia

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29 Defendants also cite a recent Fourth Circuit decision, *United States v. John Doe (Model Magazine)*, Nos. 86-5159, 86-5171, 86-5173 (Sept. 24, 1987), in support of their claim that RICO's forfeiture provisions are unconstitutional. This reliance is misplaced; *Model Magazine* is inapposite. There, the court held that a subpoena impermissibly "chilled" protected speech. Specifically, the subpoena demanded all video tapes depicting a broad range of sexual activity. So worded it was manifestly overbroad. It crossed the *Miller-Roth* line. Thus, that court reasoned that movie sellers would simply self-censor protected as well as unprotected material because the subpoena was excessively broad.

RICO is not overly broad in scope; it "chills" only the distribution of unprotected expressions; a dealer need only self-censor *obscene* matter to avoid RICO's forfeiture penalties. This type of chilling or self-censorship is constitutionally permissible and Congress manifestly intended that it occur.

30 This does not mean that subsequent punishment is wholly immune from constitutional attack; it is only immune from attack on the ground that it is a prior restraint. Subsequent punishment may be vulnerable on other grounds. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (punishment for release of information concerning confidential investigation of a judge struck down on First Amendment grounds).

RICO statute on the ground that forfeiture of property acquired with racketeering proceeds amounted to a prior restraint on presumptively protected speech.

The Georgia RICO forfeiture provisions, like those of the federal statute, make subject to forfeiture all property "of whatever nature, no matter how inoffensive, if it is acquired with racketeering proceeds." *Id.* at 514. The point to be kept in mind, as that court saw it, is that:

> Forfeiture could apply to any chattel whatever, if it was acquired with the proceeds of racketeering. Thus, if the items seized are books or movie films, the seizure is totally unrelated to their contents. they would be forfeited under the statute not because of any likelihood of obscenity, but because they were personal property realized through or derived from crime.

Id. Ultimately, the court in Western Business Svstems refused an injunction, concluding that "plaintiffs' arguments regarding the forfeiture provisions are inadequate to create a genuine suppression of speech issue." *Id.*

The Indiana Supreme Court reached a similar result in *4447 Corp. v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987), a case involving the Indiana RICO statute. That court, noting a dearth of pertinent authority, found *Western Business Systems* persuasive and ruled that the Indiana RICO, patterned after the federal act, was not an unconstitutional prior restraint. In the words of that court,

> We agree with ... [*Western Business Systems*'] reasoning that the purpose of the forfeiture provisions is totally unrelated to the nature of the assets in question. The overall purpose of the anti-racketeering laws is unequivocal, even where the predicate offense alleged is a violation of the obscenity statute. The remedy of forfeiture is intended not to restrain the future distribution of presumptively protected

> speech but rather to disgorge assets acquired through racketeering activity. Stated simply, it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene.

4447 Corp., 504 N.E.2d at 565.

The third and most recent pertinent decision is *Arizona v. Feld*, No 148389 (Ariz. Ct. App. 1987). There, an Arizona appellate court struck down portions of the Arizona forfeiture provisions insofar as they purported to reach property essentially unconnected with the racketeering activity.[31] Such provisions are not

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31 In doing so, the Arizona court criticized the Indiana Supreme Court's decision in *4447 Corp. v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987), opting instead to follow the Indiana intermediate appellate court decision at 479 N.E.2d 578 (1[illegible] The latter court had invalidated the Indiana RICO provisions as a[illegible] to obscenity on grounds that they were prior restraints on putatively protected speech and for failure to comply with procedural safeguards and to use less restrictive means. The Indiana Supreme Court vacated this ruling. This court does not find persuasive, and therefore does not follow, the reasoning of the Indiana appellate court in *4447 Corp.* or that of the Arizona appellate court in *Feld* insofar as either decision is contrued to invalidate forfeiture provisions extending only to assets that are involved in or are the fruits of the illegal racketeering activity, the so-called ill-gotten gains." This court considers and decides here that such RICO forfeiture provisions are not impermissible prior restraints and not facially unconstitutional. We do not consider or decide whether the specific pre-conviction seizure activities under the forfeiture provisions in this case permissible or impermissibly prevented the circulation of presumptively protected materials. *See supra* note 13. This seemed to be the focus of the Indiana appeals court as the state had padlocked the stores, seized books, magazines, films and the like only a relatively small part of which had been alleged to be obscene. Thus, the focus of the Indiana appellate court decision seemed to be the specific pre-conviction application of the RICO provisions in that case. No such seizure and padlocking are here in issue. Rather, the issue presented here is whether the RICO forfeiture provisions, construed to extend only to ill-gotten gains of the racketeering activity, are facially unconstitutional as prior restraints on protected speech.

here in issue.[32] Significantly, however, that court upheld those portions of the Arizona statute that most closely resemble the RICO forfeiture provisions. The forfeiture provisions upheld in *Feld*, Arizona Code § 13-2314(D)(6), are essentially similar to RICO's and provide as follows:

> 6. Forfeiture to the general fund of the state or county as appropriate to the extent not already ordered to be paid in other damages:
>
> (a) Any property or other interest acquired or maintained by a person in violation of § 13-2312.
>
> (b) Any interest in, security of, claims against or property, office, title, license or contractual right of any kind affording a source of influence over any enterprise or other property

[32] The Arizona RICO post-conviction remedies held unconstitutional in *Feld* are as follows:

(1) Ordering any person to divest himself of any interest, direct or indirect, in any enterprise.

(2) Imposing reasonable restrictions on the future activities or investments of any person....

(3) Ordering dissolution or reorganization of any enterprise.

Ariz. Rev. Stat. Ann. § 13-2314 (D)(1)-(3).

These provisions are identical to the RICO civil penalties set forth in 18 U.S.C. § 1964(a). Yet the constitutionality of RICO's civil penalties is not in issue here; this is a criminal proceeding. Even assuming these civil penalties are unconstitutional, the criminal forfeiture provisions here in issue need not fail. There exists "the elementary principle that the same statute may in part be constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand and that which is unconstitutional may be rejected." *Allen v. Louisiana*, 103 U.S. 80, 83-84 (1881), *quoted in Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985); *see also Feld*, slip. op. at 144. Thus, the Court need not and will not address the constitutionality of RICO's civil penalties as they apply to obscenity cases. This Court is well aware of "the cardinal rules governing the federal courts: '[o]ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *Brockett*, 472 U.S. at 501 (*quoting United States v. Raines*, 362 U.S. 17, 21 (1960)).

> which a person has acquired or maintained an interest in or control of, conducted or participated in the conduct of in violation of § 13-2312.
>
> (c) All proceeds traceable to an offense included in the definition of racketeering in § 13-2301, subsection D, paragraph 4 and all monies, negotiable instruments, securities, property and other things of value used or intended to be used to facilitate commission of the offense.

The Arizona court approved these forfeiture provisions stating:

> The remedy in subsection (D)(6)—forfeiture of interests or proceeds—is proper to the extent that the obscene materials themselves, or proceeds from materials determined to be obscene, may be seized. Also, as held in *Western Business Systems*, items of the enterprise could be forfeited if they were gains from other racketeering activity. *Racketeering proceeds cannot be laundered merely by being invested in bookstores.*

Feld, slip op. at 140-41 (emphasis added).

Further support exists for this Court's holding that RICO's forfeiture provisions do not act as an unconstitutional prior restraint. The Sixth Circuit, in *511 Detroit Street v. Kelley*, 807 F.2d 1293 (6th Cir. 1986), held that a state obscenity law, which imposed very large fines for obscenity violations, was not an unconstitutional prior restraint on expression. There, Michigan's obscenity laws provided for a $100,000 fine for a first offense and a mandatory $50,000 to $5,000,000 fine for a subsequent offense. The district court reasoned that the large fines made the statute "the equivalent of an unconstitutional padlocking or closure law." *Id.* at 1298 (citations omitted). On appeal, the Sixth Circuit reversed the district court, stating:

> We refuse to hold that a statute threatening fines that could impair the operation of a business is an impermissible prior restraint on expression, even where that business also

> involves dissemination of protected materials. The fact that a person does some business disseminating protected materials cannot immunize that person from large fines that may be imposed for violation of criminal law.

Id. at 1299.

In summary, this Court concludes that principle and authority confirm that RICO's forfeiture provisions, construed to reach the ill-gotten gains of racketeering activity, are not facially invalid prior restraints on protected speech.

The heart of this matter is that Congress has found that organized crime uses and exploits obscenity to further its pernicious aims and, therefore, that a pattern of racketeering activity observed deserves the forfeiture sanction. The fact that the racketeering activity involves expressive conduct is irrelevant. The First Amendment cannot be a shield for illegal activity. RICO's forfeiture provisions are not more of a restraint on free speech than is any felony conviction or prison sentence. Both of the latter are provisions that in some respect restraint speech but neither can be coherently termed a First Amendment violation. Logic dictates the same conclusion for RICO's forfeiture provision. The forfeiture remedy, properly construed and applied, does not impermissibly restrain further dissemination of speech, but rather simply requires those engaged in racketeering acts to disgorge their ill-gotten gains.

C. Eighth Amendment

Defendants claim that RICO's forfeiture provisions constitute excessive fines or cruel and unusual punishment in violation of the Eighth Amendment. Neither argument is persuasive. On their face and construed to reach only racketeering's ill-gotten gains, the forfeiture provision seem eminently apt and suitable to their undoubtedly legitimate purpose. As such, they are neither

excessive fines, nor cruel and unusual punishment. The Fourth Circuit confirmed this conclusion in *United States v. Grande*, 620 F.2d 1026 (4th Cir.), *cert. denied*, 449 U.S. 830 (1980). It found that

> The magnitude of [RICO] forfeiture is directly keyed to the magnitude of the defendant's interest in the enterprise conducted in violation of the law. Accordingly, we conclude that it is not cruel and unusual in the constitutional sense.

Id. at 1039.[33] On its face, therefore, the RICO forfeiture sanction meets the Eighth Amendment standard.

To be sure, a specific forfeiture may run afoul of the Amendment's proportionality requirement.[34] In *Solem v. Helm*, 463 U.S. 277 (1983),[35] the Supreme Court declared unconstitutional a life sentence imposed without possibility of parole and set forth a three-part test to use in reviewing the proportionality of sentences under the Eighth Amendment. *Id.* at 290-303. Certain language in the Court's opinion implied that *all* criminal sanctions are subject to proportionality analysis under the Eighth Amendment:

> [W]e hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no

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[33] *See also United States v. Huber*, 603 F.2d 387 (2d Cir. 1979).

[34] The Ninth Circuit in *United States v. Busher*, 817 F.2d 1409, 1414-15, n.9 (9th Cir. 1987) criticizes *Grande* for misapplying the proportionality requirement. This criticism seems to miss the mark and in any event does not diminish the persuasiveness of *Grande* on the questions of the facial validity of RICO's forfeiture provisions under the Eighth Amendment.

[35] In *Solem*, the Court held that a life sentence without parole was unconstitutionally disproportionate.

> penalty is *per se* constitutional. As the Court noted in *Robinson v. California*, 370 U.S., at 667, a single day in prison may be unconstitutional in some circumstances.

463 U.S. at 290 (citations omitted).

The Fourth Circuit, however, in *United States v. Rhodes*, 779 F.2d 1019 (4th Cir. 1985), held that a severe sentence for a term of years *did not* require a proportionality analysis. *Id.* at 1027-28. The court interpreted *Solem* as requiring an extensive proportionality analysis "only in those cases involving life sentences without parole." *Id.* at 1028. In light of *Rhodes*, it appears that RICO's forfeiture provisions do not require a proportionality analysis. Yet even if such an analysis is required, no final judgment can be made as to proportionality until the matter is tried. Any attempt to perform a proportionality analysis now would be premature. It is enough at this point for this Court to conclude, as it does, that RICO's forfeiture provisions are facially valid and that the forfeiture allegations in this indictment, if proved, are not on their face unconstitutionally disproportionate.[36]

D. RICO Forfeiture Does Not Violate Due Process

The Fourth Circuit has addressed the issue of whether RICO's forfeiture provisions violate the Fifth Amendment's due process clause and concluded that they do not. *United States v. Grande*, 620 F.2d 1026 (4th Cir. 1980). After careful historical analysis, the

[36] There may indeed be circumstances where the forfeiture ordered, in light of all circumstances, is unconstitutionally disproportionate. *See Busher*, 817 F.2d at 1414. Yet, whether this court has authority to mitigate or adjust the jury's forfeiture verdict is unclear. *See, e.g., United States v. Kravitz*, 738 F.2d 102, 104 (3d Cir. 1984) (under 18 U.S.C. 1963(a) forfeiture is mandatory upon finding that appellant's property was used to promote racketeering). *See generally* Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 Am. Crim. L.Rev. 747, 770 (1985) (discussing authority of district courts to mitigate jury's forfeiture verdict). In any event, this issue is not yet before the Court.

Court correctly concluded that RICO's provisions are much narrower than the broad forfeiture proscribed by Article III, § 3, cl. 2 of the Constitution.[37] Thus, RICO forfeiture is not unconstitutional as a "forfeiture of estate." *Id.* at 1039.

E. Ex Post Facto

Finally, defendants argue that RICO's forfeiture provisions, as applied to property acquired prior to 1984,[38] are violative of *ex post facto* laws. Yet all courts that have considered whether RICO violates the *ex post facto* clause of the Constitution have uniformly concluded that it does not. *E.g., United States v. Brown*, 555 F.2d 407, 416-17 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); *United States v. Campanale*, 518 F.2d 352, 364-65 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976). Indeed, the Senate Judiciary Committee, in drafting RICO, specifically considered this issue and reached the following conclusion:

> One act in the pattern must be engaged in after the effective date of the legislation. This avoids the prohibition against *ex post facto* laws and bills of attainder. Anyone who has engaged in the prohibited activities before the effective date of the legislation is on prior notice that only one further act may trigger the increased penalties and new remedies [including forfeiture] of this chapter.

S. Rep. No. 617, 91st Cong., 1st Sess. 158-160 (1970). It is clear from RICO's legislative history and subsequent case law that RICO is not constitutionally infirm as an *ex post facto* law.

[37] Article III, § 3, cl. 2 of the Constitution reads: "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." Article III, § 3, cl. 2 of the constitution was supplemented by the first congress, which enacted 1 Stat. 112, 117 (1790), presently codified at 18 U.S.C. § 3563. Currently, that section reads: "No conviction or judgment shall work corruption of blood or any forfeiture of estate.

[38] In 1984 RICO was amended to include dealing in obscene matter as a "racketeering activity." *See supra* note 4 and accompanying text.

Accordingly, defendants' properties acquired by proceeds of racketeering activity are subject to forfeiture, provided all other requirements are met, even though they were purchased prior to 1984.

CONCLUSION

The application of the RICO criminal forfeiture sanctions to the crime of obscenity raises novel and important constitutional issues. This Court concludes, at length, that Congress' decision to use RICO as a weapon against purveyors of obscenity does not offend the Constitution. This is so because the RICO criminal forfeiture provisions, as applied to obscenity, require that there be a nexus between the obscenity purveyor's ill-gotten racketeering gains and any protected material seized. Post conviction seizure of arguably protected materials and assets is constitutionally permissible where there is proper proof that they were acquired or maintained with the ill-gotten gains from racketeering activity, including dealing in obscenity. Therefore, RICO and its forfeiture provisions do not unconstitutionally chill protected speech or act as prior restraints. To be sure, RICO's sanctions are severe, but severity alone does not cause unconstitutional chilling or con-

vert these sanctions into prior restraints.[39] In adding obscenity to RICO, Congress has stayed within constitutional bounds.

An order has been entered reflecting the Court's rulings on these issues. It remains only for the Court to note that the arguments and briefs of counsel for all the defendants and the United States reflected competency, energy (on occasion, perhaps, to an excess) and ingenuity.

The Clerk of this Court is directed to send copies of this Memorandum Opinion to counsel of record.

/s/ T.S. Ellis, III

T.S. Ellis, III
United States District Judge

Alexandria, Virginia
November 3, 1987

ENTERED Nov. 3, 1987

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[39] The crux of defendants' chilling and prior restraint arguments is the alleged excessive vagueness of the obscenity standard. This attack was long ago laid to rest in *Roth* and its progeny. The *Miller-Roth* standard is a middle ground between the absolutism that would allow, indeed protect, all obscene expression and a philosophy that states should have unfettered discretion to ban as much or as little sexually explicit expression as they wish. The genius of this middle ground solution is that it allocates to the people the essential power to regulate obscenity; it defines obscenity, it does not prohibit it. That decision is left in the first instance to the people acting through Congress or their state legislatures. Conceivably, the people might choose to legalize dissemination of obscene expressions. The people have not so chosen. They have, on the contrary, chosen to exercise their right to proscribe obscenity. The *Miller-Roth* middle ground also maximizes the people's power over the regulation of obscenity by giving juries the right to decide cases under a temporally and geographically flexible community standard. This may result in an imperfect or imprecise line between obscenity and protected speech, but not an unconstitutional one.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.,
Defendants.

DEFENDANTS' EXHIBIT LIST

Exhibit No.	DESCRIPTION
1	Magazine entitled "Oralama"
2	Magazine entitled "High-Heeled Women"
3	Magazine entitled "Oui"
4	Magazine entitled "Adult Cinema"
5	Magazine entitled "Club International"
6	Magazine entitled "Erotic X Film Guide"
7	Magazine entitled "Velvet"
8	Magazine entitled "Club"
9	Magazine entitled "X-Rated Cinema and Video"
10	Magazine entitled "Nugget"
11	Magazine entitled "Kinky Couples"
12	Magazine entitled "Adult Erotica"
13	Magazine entitled "Tight Ropes"
14	Magazine entitled "High Society"
15	Magazine entitled "Swank"
16	Magazine entitled "Hustler"
17	Magazine entitled "Hottest X-Rated Film Scenes"
18	Magazine entitled "Adults Only"

19	Magazine entitled "Best of Bi-Girls"
20	Magazine entitled "Mayfair"
21	Magazine entitled "Whitehouse Digest"
22	Video tape entitled "Behind the Green Door"
23	Video tape entitled "Bizarre Styles"
24	Video tape entitled "Dracula Exotica"
25	Video tape entitled "Girls of the A Team"
26	Video tape entitled "Girls of the A Team"
27	Video tape entitled "Limited Edition, Vol. 31"
28	Video tape entitled "Taboo III"
29	Video tape entitled "True Crimes of Passion"
30	Video tape entitled "Wet Shots"
31	Diagram of the Video Rental Center located at 3523 S. Jefferson Street, Bailey's Crossroads, Virginia

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J. FREDERICK SINCLAIR

Certificate of Service

I hereby certify that on this 5th day of November, 1987, a true copy of the foregoing was hand delivered to Lawrence Leiser, Assistant United States Attorney, 701 Prince Street, Alexandria, Virginia 22314.

s/J. Frederick Sinclair
J. FREDERICK SINCLAIR

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

MEMORANDUM OPINION

This unprecedented case is fairly brimming with novel issues.[1] Those discussed here are prompted by the use, for the first time, of RICO's forfeiture provisions in the obscenity context. These issues arise as a consequence of the jury's verdict convicting the defendants of RICO obscenity violations.[2] Because the trial was bifurcated, forfeiture issues were postponed until, if needed, the second phase of the trial. That time has now arrived and these issues must be resolved.

They are, specifically:

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1 *See, e.g., United States v. Pryba*, ___F.Supp.___ (E.D.Va. 1987) (constitutionality of RICO's forfeiture provisions as applied to obscenity cases); *United States v. Pryba*, ___F.Supp.___ (E.D.Va. 1987) (admissibility of polls, surveys, and "expert" testimony regarding community acceptance of sexually explicit material); *United States v. Pryba*, ___F.Supp.___ (E.D.Va. 1987) (admissibility of prior convictions for dealing in obscenity to prove a predicate act of racketeering under RICO).

2 Defendants were indicted under RICO for dealing in obscene matter, specifically, four video tapes and nine magazines. The jury found obscene the four video tapes, "She-Male Confidential, Bizarre Encounter #9," "Wet Shots," "The Girls of A-Team," and "Punishment of Anne," and six magazines, "Torment," "She ... who must be obeyed," "Bottoms Up," "Slave Training," "Tied Up, and "Tender Shavers." The jury found one magazine, "Super Bitch," not to be obscene, and could not agree on two of the magazines, "Crotches" and "Poppin Mammas." A mistrial was granted with respect to these two magazines.

1) What is the government's burden of proof in RICO forfeiture proceedings?

2) In RICO obscenity prosecutions where practical considerations place limits on the amount of material that can be attacked as obscene, can the United States show by circumstantial evidence that material not submitted to the factfinder and found obscene is nonetheless obscene so that the business can be labeled as essentially the business of selling obscenity?

Each question is separately addressed.

1. RICO Forfeiture Burden of Proof

There is, surprisingly, no direct guidance on the burden of proof in RICO forfeiture proceedings. The RICO statute itself is silent. Equally silent is the remarkably sparse legislative history. No decision directly confronts the issue. Where it is mentioned in RICO decisions, the answer is simply assumed, with neither argument nor discussion to illuminate the issue. The parties' positions are predictable. For defendants the reasonable doubt standard is an article of faith; they rely on cases that assume without deciding that reasonable doubt is the forfeiture standard as well as the standard for determining guilt or innocence. The government, eager to avoid the rigor of the reasonable doubt standard, relies chiefly on non-RICO authority. Both arguments merit scouting, but ultimately neither is dispositive.

Typical of defendants' authorities is *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). There the court upheld a jury instruction that stated once defendant was found guilty of a RICO violation, it was the jury's duty "to determine whether the government has proven *beyond a reasonable doubt* that [defendant's] interest ... is subject to forfeiture. 706 F.2d at 1347-48 (emphasis added). The standard of proof is merely stated without argument, discussion or justification.

United States v. Horak, 633 F.Supp. 190 (N.D.Ill. 1986) is essentially similar. There, in a bifurcated RICO trial, the court held that:

> [i]n order for the government to prevail on an (a)(2) forfeiture, it must show each of the four categories of assets have some connection (a nexus) with the underlying racketeering activity. ... That nexus is shown when the government proves *beyond a reasonable doubt* that the relevant category of property provided the Defendant with a source of influence over an enterprise and Defendant has a property interest in that same enterprise.

633 F.Supp. at 199-200 (emphasis added). Again, the appropriateness of the proof standard is assumed without discussion. In another case defendants cite, the parties agreed that the nexus between property subject to forfeiture and the RICO violation had to be proved beyond a reasonable doubt. *United States v. Ragonese*, 607 F.Supp. 649, 650-51 (S.D.Fla. 1985), *aff'd*, 784 F.2d 403 (11th Cir. 1986). At least one commentator seems to have made the same assumption[3] and even the government in another case submitted a brief and published material stating the same assumption.[4]

The government's position rests chiefly on *United States v. Sandini*, 816 F.2d 869 (3d Cir. 1987), a continuing criminal enterprise (CCE) forfeiture case. Title 21, Section 853(d) provides for a rebuttable presumption in favor of forfeiture.

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[3] *See* Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 Am. Crim. L. Rev. 747, 758 n.66 (1984).

[4] *See* Brief for the United States in Opposition, *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983) (No. 83-585), *cited* in D. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES § 13.01 n.9 (1985). This position, of course, is not binding on the United States in the present case.

> There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter III of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that —
>
> (1) such property was acquired by such person during the period of the violation of this subchapter or subchapter III of this chapter or within a reasonable time after such period; and
>
> (2) there was no likely source for such property other than the violation of this subchapter or subchapter III of this chapter.

The Third Circuit construed this provision to provide for a preponderance standard throughout a CCE forfeiture proceeding and not just to establish the rebuttal presumption. Quite apart from the fact that it is a CCE case, not a RICO case, and hence distinguishable, *Sandini* may be wrongly decided. In reaching its decision the Third Circuit cited the legislative history of the CCE forfeiture provision as support. 816 F.2d at 876. That history, closely read, suggests the contrary of the *Sandini* result. It states that the presumption, "[f]ramed as a permissive and rebuttable inference rather than a mandatory presumption, ... would appear to meet constitutional standards."[5] *Ulster County Court v. Allen*, 442 U.S. 140 (1979) is cited in the legislative history as support. Significantly, *Allen* makes clear that a rebuttable presumption is constitutionally acceptable as long as the device does not "undermine the factfinder's responsibility at trial ... to find the ultimate facts beyond a reasonable doubt." 442 U.S. at 156. Thus, *Allen* and the CCE legislative history seem to suggest that permissive rebuttable presumptions established by a preponderance are

[5] Comprehensive Crime Control Act of 1984, S. Rep. No. 225, 98th Cong., 2d Sess. 191, 192, *reprinted* in 4 U.S. Code Cong. & Admin. News 3183, 3395 (1984).

acceptable in the criminal context provided they do not change the ultimate reasonable doubt standard to be used by the factfinder. Thus *Sandini* may have misread the CCE legislative history. In any event, *Sandini* is distinguishable for RICO has no rebuttable presumption provision analogous to CCE's.[6]

Ultimately persuasive to the Court is Congress' silence in the face of clear evidence in RICO and elsewhere that Congress knows how to change the proof standard when it wishes to do so. Thus, in § 1963(l), Congress has provided that a third party owner of assets that may be subject to forfeiture can save his or her interest in the asset by proving by a preponderance of the evidence that he or she is a *bona fide* purchaser or has an interest superior to the defendant's. By choosing not to use the same language in § 1963(a) Congress has invited the inference that the reasonable doubt standard should be employed throughout a RICO proceeding except where there is explicit provision otherwise.

Context adds clarity to Congress' silence on RICO forfeiture burden of proof. There is no requirement in RICO that the guilt or innocence phase of the trial be bifurcated from the forfeiture phase. Often the phases are tried together. *See e.g., Cauble*, 706 F.2d 1322; *United States v. Hess*, 691 F.2d 188 (4th Cir. 1982). Surely there can be no question that the reasonable doubt standard applies to the first phase. Almost as free from doubt is the

[6] Also distinguishable are the government's other authorities. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1983) was not a RICO case and involved *in rem*, not *in personam*, forfeiture. *United States v. Ginsburg*, 773 F.2d 798 (7th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986), held only that the government did not have to prove beyond a reasonable doubt that legal fees said to be the subject of forfeiture were still in existence at the time of conviction. The existence of assets at the time of conviction is not here in issue. Moreover, the government's chief reliance is language in a dissenting opinion which the court finds inapposite. 733 F.2d at 807 (Ripple, J., dissenting).

To sum up, no dispositive authorities exist. RICO itself is silent and the pertinent decisions merely assume the point in issue, but do not confront or discuss it.

inference that had Congress intended a different standard to apply, it would have recognized and addressed the practical difficulties involved in applying different proof standards to interrelated issues in the same proceeding. Consider, for example, the difficulty a jury might encounter in applying different standards of proof in the same trial in connection, first, with finding the existence of, and drawing the broad outlines of, a RICO "enterprise", which is necessary to determine guilt or innocence; and then defining the details of the enterprise, which may only be relevant to forfeiture. Whether bifurcation would ameliorate these difficulties is unclear. In any event, what little authority exists taken together with Congress' failure to treat the issue explicitly and grapple with the practical problems, persuade the Court that the reasonable doubt standard is and should be applicable in RICO forfeiture proceedings.[7]

II. Proof of Obscenity By Circumstantial Evidence

At the trial on the issue of guilt or innocence, the government charged as obscene four video films and nine magazines.[8] The jury found all four videos obscene as well as six of the nine magazines. Of course, the materials found obscene, four videos and six magazines, even assuming numerous copies, was apparently only a small part of the defendants' stock in sexually explicit material. Seeking to overcome this in the trial's forfeiture phase, the government sought to prove by circumstantial evidence that the defendants' businesses as a whole were chiefly in the business of selling obscene material. More specifically, the United States

[7] As stated, no authority exists which directly addresses the burden of proof applicable to RICO forfeiture. Yet when considering novel issues in a RICO setting, it is worth noting that the rule of lenity applies "even in RICO cases." *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). The Court's decision is in accord with the rule of lenity.

[8] *See supra* note 2.

offers a witness, a putative expert in obscenity investigations, who was prepared to testify that based on certain indicia common to obscenity businesses, the defendants' enterprise could be said to be chiefly in the business of selling obscene materials. Included among the indicia relied on by this witness were such factors as the existence of "peep machines", the offering for sale of so-called "rubber goods" or "marital aids", the use of the term "adult" in the store sign, and the pandering of sexually explicit material. From these circumstances, the expert would opine that much of defendants' stock in trade is obscene and that defendants are essentially purveyors of obscenity.

This testimony must be excluded; the First Amendment is an insuperable obstacle to its admission. The evidence runs outside constitutional bounds by *presuming* obscenity from circumstances and from proximity to the convicted material. There is no presumption of obscenity that arises from circumstances or from the fact that material is sexually explicit. On the contrary, there is a presumption that such expressions, however, unappealing they may be, are protected by the First Amendment. *Roaden v. Kentucky*, 413 U.S. 496 (1973). Not until the material is reviewed *in its entirety* by a judge or jury and found to meet the three *Miller-Roth* tests[9] can the material be labeled obscene and undeserving of First Amendment protection. Significantly, obscenity may not be predicated on excerpts; the material as a whole must meet the three tests. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985). Even search warrants for allegedly obscene material cannot issue except through a process "designed to focus searchingly

[9] In *Miller v. California*, 413 U.S. 15, 24 (1953), the Supreme Court held that speech may be banned as obscene where:

(a) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(b) the work describes, in a patently offensive way, sexual conduct defined by the applicable state law; and

(c) the work, taken as a whole, lacks serious literary, political, or scientific value.

upon the question of obscenity." *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961); *see also United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977) (seizure of films invalid without examination of contents of the film, notwithstanding sexually explicit photographs on boxes and notwithstanding that recipients were known dealers in sexually explicit materials).

In summary, the government's proffered expert testimony must be excluded. Obscenity is not an infection caught by proximity; it can be established only directly, not circumstantially. However important and laudable Congress' goals may be in adding obscenity to RICO, those goals cannot be achieved at the expense of ignoring the First Amendment. However important the battle against obscenity may be, we cannot permit the First Amendment to be a casualty.

The Clerk of this court is directed to send copies of this Memorandum Opinion to counsel of record.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
November 18, 1987

ENTERED Nov. 23, 1987

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA,
BARBARA A. PRYBA,
JENNIFER G. WILLIAMS, and
EDUCATIONAL BOOKS, INC.

MEMORANDUM OPINION

Introduction

After eight days of trial on the issues of guilt,[1] a jury convicted Jennifer Williams and three co-defendants of various violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq.*, and interstate transportation

[1] The trial was bifurcated. The issues of guilt were tried first to the jury and then, after verdicts of guilty on the RICO and obscenity counts, the forfeiture issues were tried to and decided by the same jury. *See United States v. Conner*, 752 F.2d 566, 569, 575 (11th Cir.) (noting that a bifurcated procedure had been followed below), *cert. denied*, 474 U.S. 821 (1985); *United States v. Cauble*, 706 F.2d 1322, 1348 (5th Cir. 1983) (advising that for future trials, forfeiture issue should be withheld from jury until after it has returned a general verdict), *cert. denied*, 465 U.S. 1005 (1984). Altogether, both phases of the trial consumed a total of eleven days. Defendant Williams elected to rest following the government's evidence on the issue of guilt. She also elected not to participate in the forfeiture stage of the trial, choosing instead to forfeit voluntarily all the corporate offices she held in the various Pryba companies that comprised the RICO "enterprise."

of obscene material, 18 U.S.C. § 1465.[2] More specifically, defendant Jennifer Williams was convicted by the jury of (1) being associated with or employed by an "enterprise"[3] and conducting or participating, directly or indirectly, in the conduct of such enterprise through a pattern of racketeering activity, 18 U.S.C. §§ 1961(4), 1962(c); (2) conspiring to use or invest income derived from a pattern of racketeering activity in the enterprise, 18 U.S.C. § 1962(d); and (3) seven counts of transporting obscene material in interstate commerce for sale or distribution, 18 U.S.C. § 1465.

Defendant Williams moved for a judgment of acquittal at the conclusion of the government's case and again after the adverse verdict. The matter was briefed and argued orally, and this Memorandum Opinion records the Court's reasons for denying the motions.

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[2] The twelve count indictment against defendants included three RICO counts, seven counts of interstate transportation of obscene material and two counts of tax fraud (26 U.S.C. § 7206). Defendant Williams was not named in the tax fraud counts. She was convicted on two of the three RICO counts and all seven of the counts charging interstate transportation of obscene material. Although the jury found that one of the magazines listed in Count 9 of the indictment was not obscene and was unable to reach a verdict as to two of the magazines listed in Count 10, a guilty verdict was rendered on both counts because they involved other magazines the jury did find to be obscene.

[3] Section 1961(4) defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." In this case, the enterprise consisted of individuals, the Prybas and Williams, together with the various corporations the Prybas established, as the government's evidence showed, for the purpose of insulating them from criminal liability. For a more complete description of the enterprise, *see infra* note 8 and appendix.

The Standard for Judgment of Acquittal

A criminal defendant seeking a judgment of acquittal in the face of an adverse jury verdict must meet a rigorous standard. In the words of the Supreme Court, "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." *Glasser v. United States*, 315 U.S. 60, 80 (1942). Cases echoing this principle are legion,[4] as are its various formulations. Among the most frequently cited and illuminating are those of the District of Columbia Circuit. In *United States v. Reese*, 561 F.2d 894 (1977), that court stated the principle in these terms:

> It is only when there is *no evidence* upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt that a motion for judgment of acquittal may be granted.

Id., at 898 (emphasis added); *see also United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982). And in *United States v. Peterson*, 509 F.2d 408 (1974), the D.C. Circuit chose the following formulation:

> To grant a motion for acquittal, the court must find that when viewed in the light most favorable to the government, the evidence is such that a reasonable juror *must* have reasonable doubt as to the existence of any of the essential elements of the crime.

Id. at 411. Finally, in *United States v. Singleton*, 702 F.2d 1159 (D.C. Cir. 1983), the court observed that, "If the evidence reasonably permits a verdict of acquittal or a verdict of guilt, the

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[4] *See, e.g., United States v. Jones*, 735 F.2d 785, 790, 791 (4th Cir.), *cert. denied*, 469 U.S. 918 (1984); *United States v. Slocum*, 708 F.2d 587, 594 (11th Cir. 1983).

decision is for the jury to make." *Id.* at 1163 (quoting *Curley v. United States*, 160 F.2d 229, 237 (D.C. Cir.) *cert. denied*, 331 U.S. 837 (1947)).

Here, defendant Williams specifically attacks the sufficiency of the evidence on "guilty knowledge." She contends that acquittal is required because the evidence does not show that she acted with "the requisite criminal intent." On this point, the Fourth Circuit has framed the standard for a motion for acquittal as follows:

> In determining whether there was sufficient evidence regarding "knowledge" to sustain the guilty verdicts, the court must consider whether any rational trier of fact could have found the existence of knowledge beyond a reasonable doubt.

United States v. Zandi, 769 F.2d 229, 235 (1985); *see also United States v. Steed*, 674 F.2d 284, 286-89 (4th Cir.), *cert. denied*, 459 U.S. 829 (1982).

In sum, defendant Williams' burden on a motion for acquittal is a formidable one; she must show that viewing the evidence in the light most favorable to the government, there is no substantial evidence to support the verdicts. To sustain the verdict, the court need only find that the record includes evidence from which a reasonable person could find guilt; it need not find that the evidence compels guilt and wholly excludes innocence. "It is not necessary [to support a conviction] that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence." *United States v. Bell*, 678 F.2d 547, 559 (5th Cir. 1982), *aff'd*, 462 U.S. 356 (1983); *see also United States v. Slocum*, 708 F.2d 587, 594 (11th Cir. 1983). With this summary of

the standard as a lens, we focus next on an examination of the evidence.

The Evidence

A review of the record compels the conclusion that there is ample and substantial evidence from which reasonable jurors could have found Williams guilty. At most, defendant Williams has shown only that the evidence does not exclude innocence. She has not shown that there was no evidence, viewed in the light most favorable to the government, to support the verdicts. Nor has she shown that the government's case, as she claims, relied "totally on speculation and inferential evidence."

First, there was ample evidence to support a finding that Williams was aware of the sexually explicit nature of the materials that Dennis and Barbara Pryba's corporations were selling. The record reflects that in the 1970's, the Prybas were engaged in the business of selling and distributing sexually explicit materials. Defendant Williams, sister of co-defendant Barbara Pryba and sister-in-law of co-defendant Dennis Pryba, began working for the Prybas' various business entities in the late 1970s. During this period and well into the 1980s, Williams worked on a daily basis at the Prybas' warehouse in Maryland. Evidence adduced at trial showed that sexually explicit materials were stored at the warehouse and that the warehouse was relatively small. The jury could reasonably have concluded that the sexually explicit nature of the warehouse inventory must have been apparent to anyone working there. Moreover, the jury could reasonable have found that the sexually explicit nature of the materials shipped in interstate commerce and sold by the enterprise was evident from the invoices Williams handled as an officer and bookkeeper of the Prybas' cor-

porations.[5] Finally, the evidence indicated that the corporations and their employees were regularly prosecuted and convicted for sale and distribution of obscene material.[6] Each of these, in

[5] Numerous government exhibits, *see, e.g.*, Nos. 56, 59, 59A, established that invoices frequently included the sexually explicit titles of materials, and from this the jury could reasonably have concluded that defendant Williams understood the nature of the products the enterprise sold.

[6] Educational Books, Inc., one of the Pryba corporations that comprised the RICO "enterprise," was convicted fifteen times in the Circuit Court of Fairfax County during 1981-83 for selling or distributing obscene material. A review of the material involved in those convictions supports the jury's conclusion that defendant Williams, given her relationship to the Prybas and her role as bookkeeper and officer for the enterprise corporations, knew well that she was involved in an enterprise that sold and distributed sexually explicit material.

Date	Obscene Material Involved in Conviction
(A) May 11, 1989	Ct. 1—Film, "Anal Ecstasy"
	Ct. 2—Film, "Cunt to Cunt"
	Ct. 3—Film, "Icing on My Cake"
	Ct. 4—Film, "Seka's Fulfillment"
	Ct. 5—Film, "Fuck Her Ass"
	Ct. 6—Film, "The Voyeur Gets His"
	Ct. 7—Film, "Seduction of the Delivery Boy"
	Ct. 8—Film, "Rape"
	Ct. 9—Film, "Up the Chute"
(B) May 18, 1982	Ct. 1—Film, "The Pleasure Shoppe"
	Ct. 2—Magazine, "Girls Who Eat Cum No. 2"
(C) May 18, 1982	Ct. 1—Magazine, "Deviations"
	Ct. 2—Magazine, "Cum Again"
	Ct. 3—Magazine, "Swedish Erotica No. 4"
	Ct. 4—Magazine, "Swedish Erotica No. 27"
(D) June 15, 1982	Ct. 1—Magazine, "Sucking Young Girls"
(E) June 15, 1982	Ct. 1—Magazine, "Rampage"
(F) June 15, 1982	Ct. 1—Magazine, "Fucking Blondes"
	Ct. 2—Magazine, "Sweet Meats"
(G) June 15, 1982	Ct. 1—Magazine, "Swedish Erotica No. 12"
	Ct. 2—Magazine, "Swedish Erotica No. 19"
	Ct. 3—Magazine, "Silky"

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Date	Obscene Material Involved in Conviction
(H) June 15, 1982	Ct. 1—Magazine, "Trio"
	Ct. 2—Magazine, "Teenage Sex"
	Ct. 3—Magazine, "American Erotica"
(I) June 15, 1982	Ct. 1—Magazine, "Hot Pepper"
	Ct. 2—Magazine, "Janet Anal Sex Queen"
	Ct. 3—Magazine, "Sexercise"
(J) Aug. 12, 1983	Ct. 1—Magazine, "Voluptua No. 5"
	Ct. 2—Magazine, "Sex Master"
	Ct. 3—Magazine, "American Erotica"
	Ct. 4—Magazine, "Cum Pumpers"
	Ct. 5—Magazine, "Suck V-1 No. 1"
	Ct. 6—Magazine, "Unreal People"
	Ct. 7—Magazine "John Holmes (No. 1 Cock)"
	Ct. 8—Magazine, "Tight Assed Blond"
	Ct. 9—Magazine, "Baby"
(K) May 16, 1983	Ct. 2—Magazine, "Nympho Housewives"
	Ct. 3—Magazine, "Luv It"
	Ct. 5—Magazine, "Sensua"
	Ct. 7—Magazine, "French Pussy"
(L) June 6, 1983	Ct. 1—Magazine, "Seke Special 1981"
	Ct. 2—Magazine, "Cunts Who Put Out"
	Ct. 3—Magazine, "Hard Core"
	Ct. 4—Magazine, "Taboo"
	Ct. 5—Magazine, "Girls Who Eat Cum"
	Ct. 6—Magazine, "Blondes Have More Cum No. 2"
	Ct. 7—Magazine, "The Best of Cum"
	Ct. 8—Magazine, "Swedish Erotica No. 30"
	Ct. 9—Magazine, "Bi Guys and A Girl"
	Ct. 10—Magazine, "Connoisseur Eries No. 2"
(M) Dec. 2, 1983	Ct. 2—Film, "Margaret's Target"
	Ct. 3—Film, "Anally Yours"
	Ct. 4—Film, "Two on a Big Stick"
	Ct. 5—Film, "Black Hammer"
	Ct. 7—Film, "Cum on Girls No. 4"
	Ct. 8—Film, "Cum On Girls No. 6"
(N) Jan. 27, 1984	Ct. 1—Film, "Houseboat, Pt I"
	Ct. 2—Film, "In and Out, Pt I"
	Ct. 3—Film, "175 Second Shift"
	Ct. 4—Film, "Country Girls"
	Ct. 5—Film, "Jungle Full of Ass"
	Ct. 6—Film, "Double Cocked"
	Ct. 7—Film, "The Banquet"
	Ct. 8—Film, "Three for Thrills"
	Ct. 9—Film, "Roll Her Derby"
	Ct. 10—Film, "Mouth to Mouth"
(O) June 18, 1985	Ct. 1—Film, "Two's Company, Three's a Crowd"
	Ct. 2—Film, "Big Tease '14'"
	Ct. 3—Film, "Incest Delight"
	Ct. 4—Film, "Anal Trio"
	Ct. 5—Film, "No. 89, A Fair Fare"
	Ct. 6—Film, "S.E. 542"
	Ct. 7—Film, "P.G. 103"
	Ct. 8—Film, "Loaded No. 155"

itself, was sufficient to put Williams on notice regarding the sexually explicit nature of the merchandise in which her employers were dealing.[7] Taken together, they compel the conclusion that the jury's verdict with respect to Williams' knowledge of the materials is amply supported by record evidence.

Williams continued to work as the RICO enterprise's sole bookkeeper until mid-1985.[8] Acts confirming her knowing participation in this enterprise include: (1) signing the annual report for Suburban News, Inc. on February 28, 1978, and listing herself as the director, president, vice president, secretary and treasurer; (2) filing an annual report as president for M Street Enterprises on January 16, 1978, and listing Dan Gottesman as the secretary of the corporation knowing that he did not serve in that capacity; (3) signing a similar document as president of M Street Enterprises in 1979 and listing herself as director, president, vice president, secretary and treasurer; (4) using the signature stamps of John R. Jones and Dan Gottesman when she knew that they were not current officials of the Prybas' corporations; (5) signing a property tax return for Suburban News in 1983 as a corporate officer and affirming under penalty of perjury that she was the president, vice president, secretary, treasurer and director of the corporation; (6) filing an application as president and secretary for

[7] It is sensibly settled that conviction under 18 U.S.C. § 1461 *et seq.* does not require proof that the defendant knew the material was legally obscene. It is enough to show that defendant knew generally that the material was sexually oriented or sexually explicit. *Hamling v. United States*, 418 U.S. 87, 119-24 (1974); *see also Rosen v. United States*, 161 U.S. 29, 41-42 (1896); *United States v. Cohen*, *583 F.2d 1030, 1042 (8th Cir. 1978)*; *United States v. Linetsky*, 533 F.2d 192, 204 (5th Cir. 1976); *United States v. Sulaiman*, 490 F.2d 78, 79 (5th Cir.), *cert. denied*, 419 U.S. 911 (1974).

[8] A vivid sense of defendant Williams' role in the RICO enterprise can be obtained from government exhibit No. 132, a portion of which is attached as an appendix to this memorandum. This exhibit graphically depicts the Pryba's RICO enterprise and the extent of defendant Williams' involvement in it. Note that all the stock of the various corporations was owned by the B & D Corporation and the Prybas owned all the stock of the B & D Corporation.

authority to transact business in Virginia on behalf of Video Shop, Ltd. and indicating that she was the sole director and stockholder when she knew that the corporation was owned by Dennis Pryba, Barbara Pryba or Barbara Pryba's father; (7) signing as president of Video Shops, Ltd. in 1984, 1985 and 1986 and declaring herself to be the president and sole director; (8) signing leases as the president of Video Shop, Ltd.; and (9) signing as an officer on corporate tax returns for B & D Corporation.[9]

The government also presented the testimony of an Internal Revenue Service agent who related events occurring in connection with the IRS' attempt to collect delinquent taxes from B & D Corporation. Williams represented that she was the president of B & D and that she had authority to pay the obligations of the corporation.

From all this evidence, the jury could reasonably have inferred that Williams, together with the other defendants, actively, knowingly and willfully participated in and furthered the interests of the enterprise. She assisted the Prybas in distributing obscene material by providing bookkeeping services. It strains credulity to argue that she was not aware that the enterprise was in the business of buying and selling sexually explicit magazines and videos in interstate commerce. Further, the jury here could reasonably and easily have concluded that Williams used her name and those of others to hide the identities of the true owners of the enterprise corporations, the Prybas. In short, the evidence is compelling, if not conclusive, that a conspiracy existed in connection with a RICO enterprise engaged in the interstate transportation and sale of obscene material. Equally compelling is the evidence of defendant Williams' strong connection with and involvement in this RICO enterprise. Such evidence is plainly

[9] This listing is not intended to be exhaustive. The transcript, when it becomes available, may disclose other evidence indicating defendant Williams' participation in, and knowledge of, the enterprise and its racketeering activity.

sufficient to convict, for " '[o]nce the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though *the connection is slight*, is sufficient to convict him with knowing participation in the conspiracy.' " *United States v. Laughman*, 618 F.2d 1067, 1076 (4th Cir.) (quoting *United States v. Dunn*, 564 F.2d 348, 357 [9th Cir. 1977] [emphasis in original]), *cert. denied*, 447 U.S. 925 (1980). Accordingly, the jury here had ample evidence to conclude (i) that Williams knowingly aided the Prybas in transporting obscene material for the purpose of sale and distribution; (ii) that she was employed by a RICO enterprise and participated in its affairs through a pattern of racketeering activity; and (iii) that she conspired to violate RICO by knowingly acting in concert with the Prybas in using or investing proceeds from racketeering activity in the enterprise. *See* 18 U.S.C. §§ 1465, 1962 (a),(c),(d).

In support of her claim that the evidence was insufficient, Williams cites *United States v. Casperson*, 773 F.2d 216 (8th Cir. 1985), in which the court reversed a bookkeeper's convictions for fraud and conspiracy. Analysis shows *Casperson* is inapposite. There, the defendant was charged with fraud as well as conspiracy to defraud. Proof of intent to defraud was therefore essential to conviction on the substantive fraud counts. The only facts to indicate the defendant's involvement in the alleged unlawful plan, however, were that he had performed some bookkeeping functions for the corporation in question, had attended promotional meetings and on one occasion had explained the corporation's program to a potential investor, was a signatory on the corporation's checking account and was referred to in documents as the corporation's vice president. The defendant, whose tenure with the corporation spanned less than one year, did not participate in the development of the fraudulent scheme, made no administrative decisions, had never met the man who masterminded the scheme, did not write checks for the corporation and

did not function as a vice president. On these facts, the court found that the level of the defendant's participation in the corporation's affairs was not sufficient to support an inference of an intent to defraud.

In sharp contrast, Williams in this case was deeply involved in the corporations' affairs for many years. She wrote checks and conducted other business, filed official documents and represented that she held offices in a number of the corporations. She assisted the Prybas in concealing their identities as the actual principals of the corporations. Unlike the activities of the defendant in *Casperson*, Williams' activities demonstrate "the knowing, affirmative cooperation" and involvement necessary to sustain her convictions under the obscenity and the RICO counts. *Casperson*, 773 F.2d at 221.

CONCLUSION

Because the jury's verdict has a substantial basis in the evidence, defendant Williams' motion for a judgment of acquittal is denied. An appropriate order accompanies this opinion.

The Clerk of the Court is directed to send a copy of this Memorandum Opinion to counsel of record.

/s/ T.S. Ellis, III

T.S. Ellis, III
United States District Judge

Alexandria, Virginia
January 20, 1988

ENTERED Jan. 29, 1988

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA,
BARBARA A. PRYBA,
JENNIFER G. WILLIAMS, and
EDUCATIONAL BOOKS, INC.

MEMORANDUM OPINION

Defendants in this novel RICO-obscenity case[1] sought in the course of trial to introduce certain poll and survey results and "expert" testimony on the issue of obscenity. The Court permitted *voir dire* of the proffered experts, examined the challenged material as well as allegedly comparable material, and reviewed the poll and survey results and methodology before ruling that the evidence must be excluded. This Memorandum Opinion records the reasons for these rulings.[2]

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1 For other opinions concerning issues in this case, see *United States v. Pryba, et al.*, F.Supp. (E.D. Va. 1987) (various issues including constitutionality of RICO in obscenity context); *United States v. Pryba, et al.*, F.Supp. (E.D. Va. 1987) (ruling on motion to disqualify counsel); *United States v. Pryba, et al.*, F.Supp. (E.D. Va. 1987) (forfeiture issues); *United States v. Pryba, et al.*, F.Supp. (E.D. Va. 1988) (motion for acquittal ruling).

2 The Court delayed issuance of this memorandum opinion to await the transcript. Since it is not yet available, the Court has concluded that further delay is unwarranted.

Background

A twelve count indictment charged three individuals and one corporation, *inter alia*, with racketeering in connection with the interstate sale of obscene videos and magazines and tax fraud. Central to the RICO and obscenity counts was whether the charged materials were legally obscene. The constitutional test for obscenity was announced by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973). Material is obscene and loses First Amendment protection where the factfinder concludes that:

> (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
>
> (2) the work describes, in a patently offensive way, sexual conduct specifically defined; and
>
> (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24; *see also Pope v. Illinois*, 107 S.Ct. 1918, 1920 (1987); *Roth v. United States*, 354 U.S. 476, 487, 489 (1957).

The question for the jury then was whether the charged materials met these tests. The question for the Court was whether, given the Miller test, the survey and expert testimony were admissible. Imbedded in this question, as the discussion following shows, were issues of relevancy, probative value, jury confusion, unfair prejudice, and competency. To understand why the court resolved

these issues against admissibility, it is necessary to describe in some detail the nature of the charged materials.[3]

The Charged Materials

The charged materials consist of four videotapes and nine magazines. Each is separately described.

1. *She-Male Confidential, Bizarre Encounter #9.* This video depicts a variety of sexual activities involving "she-males" — persons who have female bodies, including fully developed breasts. They are women in all respects save one: they have male genitalia. In the first scene, two she-males dressed as women engage in fellatio and anal intercourse with a man. The second vignette depicts a she-male inserting what appears to be a large pipe into a woman's anus. The she-male and the woman also engage in vaginal and anal intercourse. The third scene, captioned "Spanked by a Stranger," shows a man throwing a she-male to the ground and performing fellatio upon the she-male. The man then has anal intercourse with the she-male.

2. *Wet Shots.* This video features men and women engaged in vaginal and anal intercourse and oral sex. Many of the scenes involve groups of men and women. The film also contains close-up depictions of male ejaculations on the bodies and faces of others. In one scene, men are shown ejaculating into a glass of liqueur. A woman then drinks the mixture.

3. *The Girls of the A-Team.* This film, as the title might suggest, is devoted chiefly to showing anal intercourse between men and women, in couples and in groups. The film also depicts a variety of other sexual activities between women in couples and larger groups, including vaginal and anal insertion of a range of objects.

4. *The Punishment of Anne.* This video predictably has a sado-masochistic theme. A woman and a man subject a younger woman to various forms of degradation, including forcing her to urinate in front of them, photographing her while she is naked and in various positions of bondage, whipping her while she is naked, inserting vegetables into her vagina, putting chains on her and sticking pins into her breasts.

The content of most of the magazines is also sado-masochistic in nature.

1. *Torment* depicts nude and partially clad women bound and suspended by ropes, chains and straps in contorted positions. Ropes and straps appear frequently in the genital area. Many of the women have tortured expressions on their faces. Welts, whether actual or simulated, appear on some of the women. The accompanying text deals exclusively with bondage and includes descriptions of the sexual pleasure which the sadistic party derives from forcing the victim to endure painful positions of bondage for long periods of time.

2. In *She ... Who Must be Obeyed*, a women is shown subjecting a nude man to bondage and whipping. Acts of violence to the man's genitals are also vividly depicted.

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[3] Significantly, the exercise of describing these materials confirmed a fact that played some role in the Court's decision on these materials, namely, that language, however rich for some purposes, is simply unequal to the task of conveying to a reader what the visual images convey to the viewer. There is, no doubt, a large difference in communicative impact and effect between the written phrase "homosexual fellatio and anal intercourse" and the vivid depiction of it on video. For example, the latter might well be patently offensive, while the former may not. This difference in sensory impact should be taken into account in making judgments about the relevance and probative value of certain of defendant's proferred evidence.

3. *Bottoms Up* chiefly depicts nude women being spanked with hands and with objects such as canes and whips. The buttocks of several of the women appear to be red and bruised as if flagellation were actually taking place. The stories involve the sexual gratification which both the abusers and victims receive from this bizarre activity.

4. In *Slave Training*, acts of abuse to male and female genitals are shown in cartoons and photographs. In several photographs, mousetraps and tourniquet devices are pictured on women's breasts. One woman's breasts have actually become purple due to tourniquets. The text focuses on various forms of emotional and physical abuse, such as insertion of steel rings into a woman's nipples and caning of a man's penis.

5. *Tied Up* depicts naked and partially clad women in various states of bondage and includes several close-up photographs of women's genitals.

6. Finally, the photographs in *Super Bitch* depict female domination and male submissiveness.

The remaining three magazines contain graphic depictions of female genitals. *Tender Shavers* shows young women shaving their pubic hair and masturbating. Whether some of the models are adults or juveniles is unclear. Bobby socks, ponytails and makeup are employed to underscore, if not create, the appearance of adolescence, presumably to appeal to hedophiles. Crotches contains prominent, almost clinical, displays of young women's genitals. The accompanying text makes clear that the reader is supposed to believe that the models are teenage girls.

The last magazine, *Poppin Mamas*, depicts naked pregnant women in lascivious poses.[4]

A. Public Opinion Poll

Defendants attempted to introduce into evidence the results of a public opinion survey to demonstrate the community's attitude, toleration or standards with regard to sexually explicit materials. At the direction of John B. McConahay, Ph.D.,[5] a public opinion survey firm conducted the poll through telephone calls. After asking preliminary questions about the extent of the interviewee's involvement in the community, the interviewers were directed to say:

> The next few questions deal with X-rated videos and adult movies and magazines. The nudity and sex shown in these types of adult materials include: nude bodies and close-up, graphic depictions of a variety of sexual activities, including: sexual intercourse, ejaculation, bondage, oral sex, anal sex, group sex and variations of these by adult performers.

Each respondent was then asked 1) whether he thought that the portrayal of "nudity and sex" in materials available to adults only had become more or less acceptable in recent years; 2) whether he agreed or disagreed with the statement that adults who want to should be able to obtain and view materials depicting "nudity and sex;" 3) whether he believed that he should be able to buy or rent materials depicting "nudity and sex;" and 4) whether he agreed

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[4] Not surprisingly, defendants did not argue at trial that the materials possessed serious literary, artistic, political or scientific value. *See Miller*, 413 U.S. 15, 24.

The jury found the defendants guilty under 18 U.S.C. § 1465 as to all the materials at issue, with the exception of three magazines. A not verdict of guilty was returned for *Super Bitch*. The jury was unable to reach a verdict as to *Crotches* and *Poppin Mamas*.

[5] Dr. McConahay has a Ph.D. in social psychology and is an associate professor of policy sciences and psychology at Duke University.

or disagreed with the statement that adults who want to should not be able to buy or rent materials depicting "sex and nudity."

The government objected to the introduction of this survey on the grounds that it was both irrelevant to the issues in this case and methodologically flawed. After examining the poll, its methodology and results, the Court ruled that the proffered opinion poll was not relevant to whether the charged materials were obscene and therefore excluded evidence concerning the poll. The Court also concluded that even if relevant, the probative value of the poll was so slight that it was plainly outweighed by the unfair prejudicial effect the poll would have had. *See* Fed. R. Evid. 403.

Evidence concerning the poll was irrelevant because the pollster's questions were not designed to elicit information about whether there was community acceptance of the actual materials in question or similar materials. Rather, the questions focused more on the general political question whether adults should be able legally to obtain pornography. In other words, the poll's questions seemed designed to measure public opinion not on whether the charged materials were accepted in the community, but on whether the laws banning obscenity should be repealed.

Courts have recognized that properly conducted public opinion surveys may be useful in gauging community standards for the purposes of determining whether the materials at issue are obscene. *United States v. Various Articles of Merchandise, Seizure No. 170*, 750 F.2d 596, 599 (7th Cir. 1984); *Commonwealth v. Trainor*, 344 Mass. 796, 374 N.E.2d 1216, 1220 (1978); *People v. Thomas*, 37 Ill. App. 3d 320, 346 N.E.2d 190, 194-95 (1976). To be admissible, however, a public opinion poll must be relevant; it must ask questions concerning the materials involved in the case or works that are "clearly akin" to the charged materials. *Various Articles of Merchandise*, 750 F.2d at 599; *see also Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, 672, *cert. denied*, 449 U.S. 888 (1980). Moreover, the poll must address whether the

interviewee believes that the materials at issue or similar materials depict nudity and sex in an acceptable manner. *Flynt*, 153 Ga. App. 232, 264 S.E.2d at 672; *Trainor*, 374 Mass. 796, 374 N.E.2d at 1222; *Commonwealth v. Mascolo*, 7 Mass. App. Ct. 275, 386 N.E.2d 1311, 1314 (1979). The poll here fails on both scores.

First, the poll did not question interviewees regarding the materials at issue or similar materials, but rather inquired into their opinions on the viewing of "nudity and sex," defined broadly. The respondents' opinions on whether the viewing of nudity and sex in the abstract has become more less acceptable or whether adults should be able to buy or rent material depicting "nudity and sex" are simply not relevant to the question whether depictions such as those at issue are actually accepted in the community. *Flynt*, 153 Ga. App. 232, 264 S.E.2d at 672. The Court has viewed all of these materials and is confident that descriptive language fails to convey the impact of the visual image. For example, the term "bondage" in the poll's definition of "nudity and sex" simply does not adequately describe the sexual and physical abuse depicted in many of the magazines and in the film "Punishment of Anne." There are no terms in the definition which inform the respondent that he or she is being questioned about materials which show, *inter alia*, (i) women's breasts and men's genitals in tourniquet devices; (ii) close-up photographs of pregnant women's genitals with text describing the promiscuity of these women; (iii) insertion of a large pipe into a woman's anus; (iv) anal intercourse between she-males and men; and (v) a nude woman's breasts being repeatedly jabbed and punctured by pins while she hangs in chains.

Whatever the defendants' poll may show about the community's desire to overturn the obscenity laws as they relate to the depiction of "nudity and sex," it is not probative on whether the charged materials enjoy community acceptance. As the Georgia

Court of Appeals noted in *Flynt v. State*, where evidence of a public opinion poll was excluded:

> The survey questions merely inquired as to general opinions concerning the depiction of "nudity and sex," defined as "exposure of the genitals and sexual activity," and whether adults should have the opportunity to obtain such materials. ... Whether or not 76 of 100 persons would say that the change in "standards" over recent years in the depiction of nudity and sexual activities is "more acceptable" does not show that those same persons would find that the [materials] in question depicted sex and nudity in an "acceptable" manner. There was no attempt in the survey itself to determine whether the respondents were of the opinion that the contents of the [materials at issue] would or would not exceed the limits of permissible candor in the depiction of "nudity and sex."

153 Ga. App. 232, 264 S.E.2d at 672.[6] Thus, because interviewees were not sufficiently apprised of the nature of the charged materials, the responses to the poll were irrelevant to the issues involved in this case.

Second, the questions were not directed at determining whether sexually explicit material enjoys community acceptance. The fact that depictions of nudity and sex may have become more acceptable in recent years does not bear on whether the average adult person in the community, applying contemporary community standards, would find that the charged materials appeal to

[6] *But see Saliba v. State*, 475 N.E.2d 1181, 1186-87 (Ind. Ct. App.), *transfer denied*, 484 N.E.2d 1295 (Ind. 1985); *Carlock v. State*, 609 S.W.2d 787, 789-90 (Tex. Crim. App. 1980); *People v. Nelson*, 88 Ill. App. 3d 196, 410 N.E.2d 476, 478 (1980).

the prurient interest or are patently offensive.[7] *Id.*; *see also Miller v. California*, 413 U.S. 15, 24, (1973) (test for obscenity); *Smith v. United States*, 431 U.S. 291, 300-301 & n.6 (1977) (discussing concept of contemporary community standards). Whether the respondents believe that adults should be able to obtain sexually explicit magazines and videos is similarly irrelevant. *Flynt*, 153 Ga. App. 232, 264 S.E.2d at 672; *Trainor*, 374 Mass. 796, 374 N.E.2d 1216, 1222; *Thomas*, 37 Ill. App. 3d 320, 346 N.E.2d 190, 195.

In *People v. Thomas*, 37 Ill. App. 3d 320, 346 N.E.2d 190, the court, in excluding the results of a questionnaire filled out by theater patrons after they had viewed the movie at issue, held that the question "Did you feel consenting adults 18 years and older have a right to view films of this type?" was irrelevant.[8] *Id.*, 346 N.E.2d at 194, 195. And in *Commonwealth v. Trainor*, 374 Mass. 796, 374 N.E.2d 1216, another case in which survey data were held inadmissible, the court stated:

> [W]e note the absence of any indication that the willingness, the lack of willingness, or the indifference of [the survey] group to the sale of sexually explicit magazines or the showing of sexually explicit films has any relevance to any issue material to this case. The offer of proof made no attempt to connect an acceptance of, or an indifference to, the showing or sale of [the material which interviewees were questioned about] with whether the particular sexual conduct involved in this case was depicted or described in a patently offensive way. Perhaps many people would not object

[7] Even defendants' authorities support this point. In *People v. Nelson*, 88 Ill. App. 3d 196, 410 N.E.2d 476 (1980), the court admitted the results of a poll which focused on the interviewees' opinions concerning the *acceptability* of viewing and disseminating sexually explicit materials. *Id.*, 410 N.E.2d at 478, 480; *see also Saliba v. State*, 475 N.E.2d 1181, 1186, 1191 (Ind. Ct. App. 1985) (same), *transfer denied*, 484 N.E.2d 1295 (Ind. 1985).

[8] The court also found that the method of conducting the poll was flawed. *People v. Thomas*, 37 Ill. App. 3d 320, 346 N.E.2d 190, 195.

> to others' seeing such material, although they themselves regard that material as patently offensive.

Id., 374 N.E.2d at 1222.

Community acceptance is the touchstone of admissibility. It is axiomatic that community tolerance or availability does not equate with acceptability.[9] To have admitted the poll would have been to ignore this principle. By asking whether adults "should be able to" view materials depicting nudity and sex, the poll also improperly invited interviewees to disregard existing statutory restrictions on the sale and distribution of obscenity. *See United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 678 F.2d 433, 434-35 (2d Cir. 1982) (community's view on wisdom and desirability of governmental restrictions on obscenity is irrelevant to the determination of obscenity). The poll was irrelevant and therefore inadmissible.

Even if the poll's results were marginally relevant, the probative value of this evidence was substantially outweighed by the danger that it would have been unfairly prejudicial to the United States, would have confused the issues and would have misled the jury. *See* Fed. R. Evid. 403; *United States v. Milstead*, 671 F.2d 950, 953 (5th Cir. 1982) (evidence may be excluded under Rule 403 if unfairly prejudicial to government). As shown, the poll's

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[9] *Smith v. United States*, 431 U.S. at 297-98 (upholding jury instruction stating that contemporary community standards are set by what is in fact accepted in the community as a whole); *Hamling v. United States*, 418 U.S. 87, 125-26 (1974) (availability of materials similar to those defendant is charged with circulating does not automatically mean that charged materials are not obscene); *United States v. Battista*, 646 F.2d 237, 245 (6th Cir.) (community acceptance rather than community tolerance is the correct measure of obscenity), *cert. denied*, 454 U.S. 1046 (1981); *United States v. Manarite*, 448 F.2d 583, 593 (2d Cir.) ("[e]vidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance"), *cert. denied*, 404 U.S. 947 (1971).

evidentiary value was, if not nonexistent, minimal because it did not adequately explain to inteviewees the content of the charged materials and did not focus on the acceptability of such material.

These same shortcomings would have led to prejudice and confusion had testimony regarding the poll been admitted. The United States would not have been able to cross-examine the interviewees concerning their understanding of the poll's definition of "nudity and sex." Further, because the poll focused on whether adults should have the right to purchase material depicting "nudity and sex," the jury's attention would have been diverted from the central issue of community acceptance of the charged materials to the larger political question whether the law should be changed to protect obscenity. Introduction of the poll's results would also have created the unfair and incorrect inference that obscenity is to be measured by the community's tolerance of sexually explicit material, rather than its acceptance of such material. The Court therefore struck the Rule 403 balance in favor of exclusion. *See United States v. MacDonald*, 688 F.2d 224, 227 (4th Cir. 1982) ("appraisal of the probative and prejudicial value of evidence under Rule 403 is entrusted to the sound discretion of the trial judge"), *cert. denied*, 459 U.S. 1103 (1983); *see also United States v. Layton*, 767 F.2d 549, 553-55 (9th Cir. 1985) (district court enjoys wide discretion in performing Rule 403 weighing process).

B. Ethnography

1. Admissibility of Expert Testimony in Obscenity Cases

We start with the Supreme Court's teachings in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). There, the Court held that there is no constitutional need for expert testimony on the issue of obscenity once the challenged materials are placed into evidence. This is so because the materials themselves are the best evidence of what they represent. *Id.* at 56, cited in *Hamling v.*

United States, 418 U.S. 87, 102 (1974). Indeed, the subject of obscenity does not lend itself to the traditional use of expert testimony because such testimony is usually admitted only to explain to a jury what they otherwise would not understand. *See Paris Adult*, 413 U.S. at 56. As stated in *Paris Adult*, "no such assistance is needed by jurors in obscenity cases." 413 U.S. at 56; *see also Ginzburg v. United States*, 383 U.S. 463, 465 (1966). But this does not mean that expert testimony is *per se* inadmissible in obscenity cases.[16] On the contrary, the Supreme Court has held that the defendant can introduce competent, relevant, and appropriate expert testimony. *Kaplan v. California*, 413 U.S. 115, 121 (1973) (citing *Smith v. California*, 361 U.S. 147, 160 (1959) (Frankfurter, J., concurring)).

> [It is] the right of one charged with obscenity—a right implicit in the very nature of the legal concept of obscenity—to enlighten the judgment of the tribunal, be it the jury or ... the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts.

Smith, 361 U.S. at 164 (Frankfurter, J., concurring). So expert testimony is not *per se* inadmissible in obscenity trials. In appropriate cases, it is admissible. The question is whether this was such an appropriate case.

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[16] In *Sedelbauer v. State*, 455 N.E.2d 1159 (Ind. Ct. App. 1983), the appellate court held that whether materials are obscene can be determined by viewing them, thus expert testimony is not required. Accordingly, the court held that the trial court properly exercised its discretion in excluding all expert testimony and allowing the jury to determine contemporary community standards as an issue of fact. 455 N.E.2d at 1164. "While the United States Supreme Court has recognized that expert opinion *may* be used to define contemporary community standards, it has *never required* such in obscenity cases. ... The trial court's refus[al] to admit *any* testimony on community standards... [did] not amount to a denial of due process." 455 N.E.2d at 1165 (emphasis in original).

2. Testimony of Dr. Scott

Defendants sought to introduce the testimony of Dr. Joseph Scott, a sociologist with a background in statistical methodology. Dr. Scott conducted an "ethnographical" study which allegedly showed that the materials here in question are accepted by the adult community in the Alexandria division. According to Dr. Scott, an ethnographic study "looks at what is going on in the community." *North Carolina v. Anderson*, 354 S.E. 2d 264, 267 (N.C. App. 1987). To get a look at "what is going on" in the Alexandria Division of the Eastern District of Virginia, Dr. Scott did the following:

> (1) He viewed the subject materials.
>
> (2) He "probably went" to eighty or ninety bookstores, approximately sixty-nine of which sold what Dr. Scott described as "male sophisticate" magazines. He also visited about seventy-five video stores, of which forty-three sold adult videotapes.
>
> (3) He talked to the operators and customers of the stores he visited about sexually explicit (male sophisticate) materials.
>
> (4) He called newspaper editors and discussed with them the number and content of "letters to the editors" to ascertain the number and type of complaints relating to sexually explicit material.

As a result of this "ethnography," Dr. Scott was prepared to offer the jury his opinion that the "overwhelming majority" of adults in the community have at one time or another viewed sexually explicit material and that such materials, including the materials here in question, are readily acceptable by the average adult in the community. He prepared no report; he had only his notes.

To reach his sweeping conclusion, Dr. Scott, who has never lived in Virginia, required only eight days.[11]

The issue is whether such testimony is competent expert evidence of the prevailing community standards.[12] It is not. Such testimony is inadmissible, for it is unreliable, unfairly prejudicial, and confusing and misleading to the jury.

3. Analysis

Under Rule 702 of the Federal Rules of Evidence, expert testimony is admissible only where (i) the witness is *qualified* as an expert, *see* Fed. R. Evid. 104(a), and (ii) the testimony will assist the jury in determining a fact in issue. It is within the discretion of the trial court to determine whether these requirements are met. *See Salem v. U.S. Lines Co.*, 370 U.S. 31 (1962); *United States v. Trice*, 476 F.2d 89 (9th Cir. 1973). In obscenity trials, it is well-settled that the trial court retains "wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." *Hamling v. United States*, 418 U.S. 87, 108 (1974). Also well-settled is that it is the defendants'

[11] During those eight days, Dr. Scott was assisted by an employee of defendant Dennis Pryba. This employee assisted in choosing the video and book stores that Scott visited during his "study" and chauffeured Dr. Scott to these various stores.

[12] Dr. Scott conceded that ethnography is a new approach to the study of community acceptance of sexually explicit material, but claimed that it is generally accepted in the social science field. Yet general acceptance of ethnography in the social sciences, even if true, does not mean that Dr. Scott's ethnography in this case qualifies him as an expert in the contemporary community standards of the Alexandria Division. *Cf. Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The problem here is that Dr. Scott's ethnography is not scientific in the sense understood in *Frye*. There is a difference between scientific studies and methodologies in the natural sciences and studies found acceptable in the social sciences. The former must typically meet more rigorous standards and be subject to reliable replication. Put more directly, Dr. Scott's interviews of adult video store clerks, store managers, and customers over an eight-day period is simply not science.

burden to show admissibility. *United States v. Womack*, 294 F.2d 204, 206 (D.C. Cir. 1961). Here, the defendants have failed to meet their burden; here, the evidence sought to be introduced is inadmissible because (i) Dr. Scott is not qualified to offer an opinion as to contemporary community standards of obscenity in the Alexandria Division, and (ii) even if Dr. Scott is qualified, the evidence is unfairly prejudicial and misleading to the jury.

(a) Rule 104(a): Witness Must be Qualified

The Court holds that the bases of Dr. Scott's opinion are insufficient to qualify him as an expert either on contemporary community standards of obscenity in the Alexandria Division, or on the question of whether the materials in issue are accepted by the community. Dr. Scott admits that ethnography is a "new approach" in the study of sexual mores.[13] He described ethnography as a qualitative analysis of a community, a method used to "assess" community standards. "Ethnography is the work of describing a culture." J. Spradley, The Ethnographic Interview 3 (1979). The issue is whether Scott's ethnographic evidence properly reflects contemporary community standards.[14] It does not. Stripped of its scientific disguise, Dr. Scott's so-called "ethnogra-

[13] The Court's research has uncovered only one case in which an ethnographic study of obscenity was cited. In *Parmelee v. United States*, 113 F.2d 729 (D.C. Cir. 1940), Associate Justice Miller cited Schroeder, "Obscene" Literature and Constitutional Law (1911) c. XIII, Ethnographic Study of Modesty and Obscenity, as general support for the proposition that nudity is not obscene per se. *Id.* at 734 n.17.

[14] There is but one reported case in which an ethnographic study was offered as evidence of contemporary community standards in an obscenity case. *State v. Anderson*, 354 S.E.2d 264 (N.C. 1987). Indeed, the few cases that discuss this science concern its application to the study of different cultures, such as peyotism and the Peyote Cult, *Oliver v. Udall*, 306 F.2d 819 (D.C. Cir. 1962); the social system of the Rastafa ns, *Robinson v. Foti*, 527 F. Supp. 7111 (E.D. La. 1981); and evidence that Armenians are white persons so as to be eligible for naturalization as American citizens, *United States v. Cartozian*, 6 F.2d 919 (D. Or. 1925).

phy" is shown to be nothing more than a series of interviews with dealers of sexually explicit materials and their customers. This is neither science, nor work requiring expertise. Moreover, Scott did not visit churches, community centers, garden clubs, Rotary Clubs or the like to develop a basis for his opinion. Also, Dr. Scott did not show the films or magazines here in issue to those whom he interviewed, but instead discussed only those sexually explicit materials sold in the stores that he visited. In sum, defendants have failed to establish how Scott's ethnography is related to the general community's acceptance of the specific materials in issue.[15]

In essence, defendants seek to introduce, through the testimony of Dr. Scott, community acceptance of allegedly *comparable* material. While expert testimony may serve as a substitute for voluminous comparable evidence,[16] there is no evidence that the materials Scott examined and "discussed" with interviewees met the test of comparability as set forth in *Womack v. United States*, 294 F.2d 204 (D.C. Cir. 1961). In *Womack*, the trial judge refused to admit into evidence dozens of books and magazines depicting nudes. The D.C. Circuit affirmed the exclusion, holding that such evidence was immaterial, irrelevant, and of no probative value as it was not comparable to the materials in issue. 294 F.2d

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15 For a case in which a similar result was reached see *Albright v. State*, 501 N.E.2d 488 (Ind. Ct. App. 1986), where the court held inadmissible expert testimony on contemporary community standards. There, defendant's "expert" was a certified sex therapist who lived and practiced in the relevant community and who examined 200 patients over a three year period, 60 of whom had sexual dysfunctions. The intermediate appellate court upheld the exclusion of such testimony stating that the testimony failed to show "[a] basis for forming an opinion as to the general community's attitudes toward sexually explicit material." 501 N.E.2d at 493.

16 *Commonwealth v. United Books, Inc.*, 389 Mass. 888, 453 N.E.2d 406, 412 n.4 (Mass. 1983) ("The importance of expert testimony in an obscenity case is also demonstrated by the fact that it can serve as a substitute for voluminous comparative evidence.") (citing *Hamling v. United States*, 418 U.S. 87, 127 (1974)).

at 206. The court stated that for comparable evidence to be admissible, the defendant must show (i) that the two types of matter are similar, and (ii) that the materials to be introduced have a "reasonable degree of community acceptance." *Id.* Here, there was no evidence that the "male sophisticate" material Scott examined and discussed was comparable to the materials in issue. Indeed, many of the tapes and magazines that Scott used in his study had been found not comparable by this Court.[17] Accordingly, the Court will not allow defendants to introduce circuitously that which has already been declared inadmissible.

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17 The Court examined a substantial number of tapes and magazines proffered by defendants as comparable to the charged materials. On the basis of *Womack v. United States*, 294 F.2d 204 (D.C. Cir. 1961) (whether proffered materials are comparable is a question for the court), the Court concluded that much of the material was not comparable in content.

Also, Scott's testimony must be excluded because it is predicated solely upon qualitative rather than quantitative analysis.[18] Scott's analysis, *i.e.*, talking to customers and vendors of sexually explicit material and reviewing letters to the editors of various publications, in no way demonstrates community acceptance of the materials here in issue. Scott's testimony, although perhaps reflecting availability of the materials surveyed, fails to evidence community acceptance. It is well-settled that mere availability does not equate with community acceptance. *See infra* note 9 and accompanying text. Scott offers no *quantitative* analysis for much of his male sophisticate material, such as sale or distribution figures, which might have been probative of community acceptance.[19] Dr. Scott's ethnography, in essence, constitutes nothing

[18] There is authority that qualitative expert testimony in obscenity cases may be admissible, but this authority is not persuasive. In *Commonwealth v. United Books*, 389 Mass. 888, 453 N.E.2d 406 (Mass. 1983), it was held that the trial court erred in excluding defendant's proffered expert testimony on the artistic value of the materials in issue. There, however, the evidence was uncontroverted that the expert was a professor of English and an affiliate professor of Biology at Clark University in Worchester, Massachusetts, (the community standard to be applied was that of Massachusetts), that he had been a professor there for twenty years, that he had taught a course surveying erotic art over the centuries, that he had taught over 100 students in this course and was familiar with their views on erotic art, that the course dealt in part with the nature of erotic expression in Massachusetts, and that he also did independent investigation in the Worcester area to study erotic art. 453 N.E.2d at 412-13. *See also State V. Hull*, 86 Wash. 2d 527, ____, 546 P.2d 912, 920 (Wash. 1976) (admission of expert testimony of a psychiatrist regarding contemporary community standards did not constitute reversible error where psychiatrist conducted a five and one-half year study on the moral attitudes of residents pertaining to sexually explicit material). But in each of these cases there was, unlike the instant case, an adequate basis for the expert's opinion. *Compare United Books*, 453 N.E.2d 406 and *Hull*, 546 P.2d 912 with *Albright v. State*, *supra* note 14.

[19] There were two magazines, however, for which Scott did proffer some sales and distribution figures. The Court examined these magazines and found them to be comparable to the charged materials. Accordingly, the Court permitted Dr. Scott to testify as to that material, but defendants declined to present such testimony.

more than a one-man, eight-day, unscientific poll of purveyors and purchasers of smut. To permit this so-called "study" to masquerade as expert testimony on Northern Virginia's contemporary community standards of obscenity is ludicrous.[20] This "study" did not and could not make Dr. Scott a competent, reliable expert on the contemporary community standards on sexually explicit material in Northern Virginia. Accordingly, the Court excluded Dr. Scott's testimony as falling far short of even minimal standards under Rules 702 and 104 of the Federal Rules of Evidence.

(b) Rule 403 Analysis

Even assuming that Dr. Scott is qualified as an expert, his testimony warranted exclusion under Fed. R. Evid. 403. Expert testimony is, of course, subject to the balancing test of Rule 403, under which probative value is measured against prejudicial effect. In criminal cases the 403 balancing test is usually applied to insure that the defendant is not unfairly prejudiced, yet the prosecution is also entitled to such protection. *See, e.g., United States v. Milstead*, 671 F.2d 950 (5th Cir. 1982). In applying the

[20] *But see State v. Anderson*, 354 S.E.2d 264 (N.C. 1987). In *Anderson*, the defendant was convicted of dealing in obscenity. The North Carolina Court of Appeals held that the trial court's exclusion of Dr. Scott's testimony was erroneous and that defendant was entitled to a new trial. There, Dr. Scott performed an ethnographic study similar to the one here in issue. The North Carolina intermediate appellate court stated that while some of Dr. Scott's methods could be said to demonstrate mere availability, the court "[did] not believe that the study [was] so entirely flawed as to render [Scott's] opinion on patent offensiveness wholly irrelevant and inadmissible." *Id.* at 269. *Anderson*, however, is not persuasive. There is, moreover, a distinction. Dr. Scott lives and teaches in North Carolina and presumably has a better understanding of the contemporary community standards throughout that state. In addition, the community standards in issue were those of Catawba County, North Carolina, which encompasses 395.66 square miles and has a population of only 114,143. Presumably, the community in Catawba County is less diverse than the Northern Virginia community. In any case, the court declines to follow the rationale in *Anderson*.

balancing test, the trial court is accorded broad discretion. *See Garraghty v. Jordan*, 830 F.2d 1295, 1298 (4th Cir. 1987); *United States v. Penello*, 668 F.2d 789, 790 (4th Cir. 1982); *see also United States v. Lowe*, 569 F.2d 1113 (10th Cir. 1978). Here, Dr. Scott's testimony must be excluded under Rule 403 for its probative value, if any, is outweighed by the danger of unfair prejudice and jury confusion.

Scott's testimony has little or no probative value because, as discussed, (i) he is not familiar with the Alexandria Division and spent only eight days here, (ii) he interviewed only dealers and purchasers of "adult sophisticate" materials and in these interviews failed to discuss any video or magazine here in issue, and (iii) his discussions with various newspaper editors on "letters to the editors" regarding obscenity in no way indicate that the materials here are accepted by the community. Scott's ethnography, if read generously, could conceivably be probative of community acceptance of noncomparable sexually explicit material. But this evidence, although limited in probative value, would have been unfairly prejudicial because Dr. Scott's analysis is based largely on hearsay and the United States would not have been able to cross-examine the interviewees concerning their understanding of Scott's questions. Further, Scott's testimony, being clothed in the guise of expert testimony, would have diverted the jury's attention from the issue of community acceptance of the charged materials to the issue of community acceptance of noncomparable materials. *See generally United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) (scientific evidence may "assume a posture of mythic infallibility in the eyes of a jury of laymen"); *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973) (expert testimony excluded because of potentially prejudicial effect on the jury arising from the "aura of special reliability and trustworthiness" of scientific expert testimony). Accordingly, Scott's testimony was excluded.

The Clerk is directed to send copies of this Memorandum Opinion to all counsel of record.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
January 29, 1988

(Revised February 12, 1988)

ENTERED Feb. 12, 1988

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

MEMORANDUM OPINION

Defendants, Dennis E. Pryba, Barbara A. Pryba, Jennifer G. Williams and Educational Books, Inc., are charged, *inter alia*, with participating as principals in a "pattern of racketeering" involving the sale and distribution of allegedly obscene materials and with investing the proceeds of such activities in an "enterprise" engaged in interstate commerce, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(a).[1] The enterprise is said to consist of the Prybas, Williams, Educational Books and seven unindicted corporations.

The issue presented is whether defendant Educational Books' prior state court convictions for dealing in obscene matter are admissible to prove acts of racketeering under RICO.[2] This Court holds that such prior state court convictions are admissible to prove predicate acts of racketeering on the part of Educational Books in this federal RICO action.

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[1] RICO was amended in 1984 to include "dealing in obscene matter" as a racketeering activity.

> "Racketeering activity" means any act or threat involving ... dealing in obscene matter, ... which is chargeable under state law and punishable by imprisonment for more than one year....

18 U.S.C. § 1961(1)(A).

[2] Under RICO, a "pattern of racketeering activity" requires at least two predicate acts of racketeering. 18 U.S.C. § 1961(5).

That Congress intended to permit such evidence is strongly implied by the structure, terms and purpose of RICO as well as the decisions of several federal courts. RICO defines racketeering activity as any act or threat involving, *inter alia*, "dealing in obscene matter ... which is chargeable under state law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1)(a). RICO makes clear that certain violations of state law can be predicate offenses uner federal RICO. The issue thus becomes whether a state court conviction can be introduced as evidence of racketeering activity or whether the acts underlying the state conviction must be relitigated in a federal RICO suit.

While there is no controlling authority, a number of decisions support the Court's holding that a prior state court conviction is admissible to prove a predicate act of racketeering activity necessary to establish a RICO violation. In *United States v. Erwin*, 793 F.2d 656 (5th Cir. 1986), the defendant's prior federal conviction for conterfeiting was admitted to prove one of the requisite two predicate offenses for RICO. "In a subsequent trial for RICO, the government may count, as a predicate offense, a defendant's prior conviction for an offense falling within the definition of 'racketeering activity.' " *Id.* at 670 (citing *United States v. Black*, 759 F.2d 71, 72-73 [D.C. Cir. 1985]). Similarly, *United States v. Persico*, 621 F.Supp. 842 (S.D.N.Y. 1985), held that defendants' guilty pleas and subsequent convictions in another federal proceeding were admissible as evidence to establish a predicate act under RICO. The *Persico* court stated that Congress, in enacting RICO, "contemplated the admission of prior convictions, obtained pursuant to plea agreements, to establish a predicate act." *Id.* at 871 (citations omitted).

Prior convictions in a state court proceeding are also admissible to establish a predicate act under federal RICO. *United States v. Andreadis*, 366 F.2d 423 (2d Cir. 1966), held that defendant's plea in state court to a charge of false advertising was admissible in a

later federal prosecution for mail fraud arising from advertising. *Id.* at 433. Similarly, in *United States v. Myers*, 49 F.2d 230 (4th Cir.), *cert. denied*, 283 U.S. 866 (1931), the Fourth Circuit held that a state court guilty plea to a charge of possession of illegal liquor was admissible in a subsequent federal prosecution for unlawfully selling liquor. *Id.* at 231. Neither case involved RICO. Still, there exists no reason why the rationale of *Andreadis* and *Myers* cannot be applied to a federal RICO action. Indeed, the Court in *Persico* cited both *Myers* and *Andreadis* in support of its holding that prior convictions are admissible in a federal RICO action. *Perisco*, 621 F.Supp. at 872.

The dual sovereignty rule does not dictate the contrary. While it is true that both sovereigns may not prosecute the same act or acts, this is no reason to refrain from giving preclusive effect to a state conviction in the RICO context. To hold otherwise would ignore settled doctrine giving preclusive effect to convictions, cause a waste of judicial time and resources, and raise the spectre of inconsistent results. But prior convictions are only admissible against the RICO defendant who was the subject of the previous conviction. Prior convictions of one RICO defendant are not admissible against co-defendants in a RICO suit to prove acts of racketeering by those co-defendants. Only the defendant who was previously convicted had an opportunity to confront the accusers and witnesses and litigate the matter before a jury.

Where, as here, the indictment alleges that acts of racketeering were committed by all defendants, and only one defendant was the subject of the prior convictions, then the government must adduce proof of other racketeering acts with respect to those defendants separate and apart from the prior convictions. To protect the co-defendants from any prejudicial spillover effect of the prior convictions, the Court will instruct the jury that it cannot consider the prior convictions as proof of a pattern of racketeering acts against any defendant except the one who was the subject of

the conviction. To rule otherwise would infringe upon the other defendants' Sixth Amendment rights.

An appropriate order has been entered.

/s/ T. S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
March 8, 1988

ENTERED March 8, 1988

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA;
BARBARA A. PRYBA;
JENNIFER G. WILLIAMS; and
EDUCATIONAL BOOKS, INC.

RESTRAINING ORDER

This matter having come before this Court on the Motion of the United States of America for a restraining order, pursuant to Title 18, United States Code, Sections 1963(b) and 1963(d)(1)(A), to enjoin, restrain and prohibit the defendants DENNIS E. PRYBA, BARBARA A. PRYBA, and JENNIFER G. WILLIAMS and any of their agents or nominees, any of the corporations named hereinafter, and anyone acting at their direction or on their behalf, from disposing of certain interests subject to forfeiture pursuant to 18 U.S.C. § 1962, and the Court having considered the motion, it is hereby

ORDERED and ADJUDGED

1. That the defendants DENNIS E. PRYBA, BARBARA A. PRYBA, and JENNIFER G. WILLIAMS, any of their agents or nominees, any of the corporations hereinafter named, and anyone acting at their direction or on their behalf, shall be enjoined, restrained, and prohibited from assigning, selling, leasing, mortgaging, encumbering, or in any other way, disposing or diminishing any interest in and control over B & D Corporation, EDUCATIONAL BOOKS, INC., Marlboro News, Inc., Home Video Sales, Inc., and Video Shop, Ltd., Inc., or any of the assets thereof, real property and personal property as described below.

A. The following real property or the proceeds thereof:

(1) Approximately 7.73551 acres, including any improvements, appurtenances and fixtures thereon, situated in Fairfax County, Virginia, and known as 10606 Belmont Boulevard, Lorton, Virginia; and more particularly described in the record office of the circuit Court, Fairfax, Virginia, in Deed Book 4352, Page 409, as set forth below:

> Beginning at a found pipe marking a common corner to Charles R. Hooff, Jr., said pipe also being on the mean tide line of Belmont Bay as established by survey dated July 21, 1960; thence No. 44° 58'44"W, continuing with the said mean tide line 45.13 feet to a point; thence N. 82° 11'14"W. 172.93 feet to a point; thence N. 74°47'14"W 157.10 feet to a point; thence N. 84° 3'54"W 153.679 feet to a point; thence N. 06° 52'16"E. through the land or Dorothy Hall Whitner passing through a set pipe at 50.00 feet 575.75 feet to a set pipe; thence S. 83° 07'44" E. 594.346' to a set pipe in the line of said Charles R. Hooff, Jr., thence S 10° 42'52"W continuing with said Hooff 500.291 feet to a found pipe; thence S. 25° 37'31" W. 134.739 feet to the place of beginning containing 7.73551 acres of land as shown on a plat prepared by Larry N. Scartz, Certified Land Surveyor dated February 5, 1976, recorded herewith. AND BEING the same property conveyed to the Grantor by deed recorded in Deed Book 2914, at page 24, of the land records of Fairfax County, Virginia.

(2) A parcel of property commonly known as 8411 Old Marlboro Pike, Unit 15, Upper Marlboro, Maryland, part of the Penn Belt Industrial Condominium Complex and more particularly described in the record office of Prince George's County, Maryland, in Deed Book 5652, page 211, as set forth below:

> Unit numbered Fifteen (15), in a plan of condominium subdivision known as "PENN BELT INDUSTRIAL CONDOMINIUM", as per plats thereof recorded in Plat Book 93, at Plats 74 to 77, inclusive, among the Land

Records of Prince George's County, Maryland, as the same is otherwise identified and established in the master Deed and By-Laws recorded in Liber 4638 at folio 765 among the aforesaid Land Records.

B. The following stock certificates, holdings and interests or proceeds thereof:

(1) All shares of stock of B & D Corporation, each share having a par value of $50.00, owned by or on the behalf of DENNIS E. PRYBA;

(2) All shares of stock of EDUCATIONAL BOOKS, INC., having no par value; issued to B & D Corporation, all of the authorized stock of which is owned by or on the behalf of DENNIS E. PRYBA;

(3) All shares of stock of Marlboro News, Incorporated, each share having a par value of $1.00; issued to B & D Corporation, all of the authorized stock of which is owned by or on the behalf of DENNIS E. PRYBA;

(4) All shares of stock of Home Video Sales, Incorporated, each share having a par value of $10.00; issued to B & D Corporation all of the authorized stock of which is owned by or on behalf of DENNIS E. PRYBA;

(5) All shares of stock of Video Shop, Ltd., each share having a par value of $10.00; issued to Home Video Sales, all of the authorized stock of which is owned by B & D Corporation which is owned by or on the behalf of DENNIS E. PRYBA.

C. The following vehicles or the proceeds thereof:

Vehicles/Item	Purchaser	Price
(1) 1981 Audi Lic #GBG-705	B & D Corporation 8411 Old Marlboro Pike Upper Marlboro,MD 20772	
(2) 1985 Chevrolet Blazer VIN IG8CT18B4F0210345 MD Lic #Z-38717	Video Rental Center 8411 Old Marlboro Pike Upper Marlboro,MD 20772	17,662.94

(3) 1986 Chevrolet Sprint VIN JG1MR6852GK806925 MD Lic #JKC-245	Video Rental Center 8411 Old Marlboro Pike Upper Marlboro,MD 20772	7,140.38
(4) 1986 Chevrolet Van VIN 1GCDM15206B118910 MD Lic #Y-863 55	Video Rental Center c/o Dennis E. Pryba 8411 Old Marlboro Pike Upper Marlboro,MD 20772	11,253.81
(5) 1984 Mercedes Benz 500SEL VIN WDBCA37B7EA075684 VA Lic #FPT-739	Barbara Ann Pryba 10606 Belmont Blvd. Lorton, VA	53,125.00
(6) 1986 Chevrolet Sprint VIN JG1MR0852GK72G277 VA Lic #LFJ-284	Barbara Ann Pryba 10606 Belmont Blvd. Lorton, VA 22079	7,684.32

D. The following bank accounts and all funds credited to the accounts as of the date of this indictment:

Bank	Account Name	Account No.
1st American Bank of Virginia Arlington, VA	Educational Books, Inc. 9158 Richmond Hwy. Fort Belvoir, VA	00055123
MD. Nat. Bank Oxon Hill, MD	Video Shop Ltd, Store 30 6193 Livingston Rd. Oxon Hill, MD	512012386
United VA. Bank Northern Region Alexandria, VA	Video Shop Ltd. 9156 Richmond Hwy. Fort Belvoir, VA	080-04-978
1st National Bank of MD Baltimore, MD	Home Video Sales, Inc. 8411 Old Marlboro Pike Upper Marlboro, MD	6215279-8
Citizens Bank & Trust of MD Riverdale, MD	Marlboro News, Inc. 7425 Annapolis Rd. Hyattsville, MD	0397258
Citizens Bank & Trust of MD Riverdale, MD	B & D Corporation 8411 Old Marlboro Pike Upper Marlboro, MD	037 0341

1st VA. Bank Falls Church, VA	Video Shop, Ltd. 277 S. Van Dorn St. Alexandria, VA	0774 0344
Suburban Bank and Trust (Sovran Bank of MD) Wheaton, MD	Marlboro News, Inc. 7609 Marlboro Pike Forrestville, MD	46-0529-3
Suburban Bank and Trust (Sovran Bank of MD) Wheaton, MD	B & D Corporation 8411 Old Marlboro Pike #15 Upper Marlboro, MD	2801813
United VA Bank of Northern Region Alexandria, VA	Barbara A. Pryba	295-93-255

E. The following personal property and proceeds thereof:

(1) All the personal property of EDUCATIONAL BOOKS, INC., and Marlboro News, Inc. "Property" includes but is not limited to the contents of the below-listed locations, all 8mm projectors ("Peep Machines"), television monitors, coin boxes and their contents, video cassette tape players, video cassettes (blank and recorded), magazines and other printed material, "rubber goods" and other inventory, cash registers and contents, coin changing machines, shelving and display materials, and United States currency.

(a) Educational Books
9158 [illegible]hmond Highway
For[illegible]voir, Virginia

(b) Marlboro News, Inc.
7609 Marlboro Pike
Forrestville, MD

(c) Marlboro News, Inc.
7425 Annapolis Rd.
Hyattsville, MD

(2) All personal property of Video Shop, Ltd., d/b/a Video Rental Centers. "Property" includes but is not limited to the contents of the locations listed below and any and all locations from which Video Shop, Ltd., conducts its business, video cassette tapes (blank and recorded; for purchase and rent), computers (hardware and software), television monitors, video cassette recorders, video accessories, cash registers and contents, shelving and display material, and United States currency.

(a) 804 Rockville Pike
Rockville, Md.

(b) 10288 Festival Lane
Manassas, Va.

(c) 6193 Livingston Rd.
Oxon Hill, Maryland

(d) 9156 Richmond Hwy.
Ft. Belvoir, Va.

(e) 8328 Richmond Hwy.
Alexandria, VA.

(f) 13711-A Jefferson Davis Hwy.
Woodbridge, Va.

(g) 277 S. Van Dorn
Van Dorn Plaza
Alexandria, Va.

(h) 3525 S. Jefferson St.
Leesburg Pike Plaza
Bailey's Crossroads, Virginia

(i) 13748 Smoketown Road
Dale City, Virginia

(3) All the personal property belonging to the B & D Corporation. "Property" includes but is not limited to the contents of the warehouse located at Unit 15, 8411 Old Marlboro Pike, Upper Marlboro, Maryland, film projectors, television monitors, video cassette recorders, video cassettes (blank and recorded), computers (hardware and software), cash registers and contents, safes, furniture, adding machine, stationary, magazines, "rubber goods" and other inventory, shelving and display materials, and United States currency.

(4) All the personal property belong to Home Video Sales, Incorporated, located at Unit 15, 8411 Old Marlboro Pike, Upper Marlboro, Maryland.

F. All the rights, titles, privileges, interests and claims of DENNIS E. PRYBA as the president, vice-president, secretary, treasurer and director of Home Video Sales, Inc. and any other offices or positions he may hold at the time of the filing of this indictment.

G. All the rights, privileges, interests and claims of JENNIFER G. WILLIAMS as the president, vice-president, secretary, treasurer and director of Video Shops, Ltd., Inc.; secretary of B & D Corporation, Inc.; and secretary of Marlboro News, Inc., and any other offices or positions she may hold at the time of the filing of this indictment.

2. That pursuant to 18 U.S.C. §§ 1963(b) and 1963(d)(1)(A), this Court has jurisdiction to enter a restraining order or such prohibitions, require the execution of a satisfactory performance bond, or take any other action as it deems proper to preserve the availability of the property described in paragraph 1 herein.

3. That this Court's power to so act is plenary and may be entered *sua sponte* or *ex parte* without the necessity of a hearing when an indictment has been returned. 18 U.S.C. § 1963(d)(1). *See United States v. Harvey*, 814 F.2d 905, 928 (4th Cir. 1987).

4. That this restraining order is issued pursuant to Title 18, United States Code, Section 1963(b) in order to preserve the assets "to prevent dissipation pending a determination of guilt or innocence." *United States v. Bello*, 470 F. Supp. 723, 725 (S.D. Cal. 1979); *United States v. Long*, 654 F.2d 911 (3rd Cir. 1981).

5. That the United States Marshal Service shall be allowed access to the property described in paragraph 1 for the purposes of ascertaining the condition and value of the property.

6. That the United States Marshals Service shall be permitted to hire a Certified Public Accountant who shall prepare audited financial statements of DENNIS E. PRYBA, BARBARA A. PRYBA, JENNIFER G. WILLIAMS, EDUCATIONAL BOOKS, INC., and B & D Corporation, Marlboro News, Inc., Home Video Sales, Inc., and Video Shop, Ltd., Inc., and that DENNIS E. PRYBA, BARBARA A. PRYBA, and JENNIFER G. WILLIAMS shall permit such Certified Public Accountant access to all relevant and necessary books, records and documents.

7. That copies of the aforementioned audited financial statements shall be immediately supplied to the United States Marshal Service and supplied thereafter on a quarterly basis.

8. That DENNIS E. PRYBA, BARBARA A. PRYBA, and JENNIFER G. WILLIAMS may continue to operate B & D Corporation, Inc., Marlboro News, Inc., EDUCATIONAL BOOKS, INC., Home Video Sales, Inc., and Video Shop Ltd., Inc., in a normal business manner, including the payment of all salaries and liabilities that exist as of the date of the filing of this order, as long as the normal conduct of business does not substantially dissipate or diminish the value of the assets of the aforedescribed property.

9. That DENNIS E. PRYBA, BARBARA A. PRYBA, and JENNIFER G. WILLIAMS may be paid their ordinary and necessary living expenses arising during the course of these proceedings, as well as the payment of reasonable attorneys fees, as long as said payments do not substantially dissipate or diminish the value of the assets of the aforedescribed property.

10. That any disposition or transfer of assets shall be made only upon application to this Court, after timely notice to the government.

SO ORDERED THIS 13th DAY OF AUGUST, 1987.

/s/Claude M. Hilton
JUDGE, UNITED STATES DISTRICT COURT

ENTERED Aug. 13, 1987

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA;
BARBARA A. PRYBA;
JENNIFER G. WILLIAMS; and
EDUCATIONAL BOOKS, INC.

ORDER MODIFYING RESTRAINING ORDER FILED ON AUGUST 13, 1987

This matter having come before this Court on a stipulated Motion of the United States of America and the defendants for modification of the Restraining Order entered by this Honorable Court on August 13, 1987, pursuant to Title 18, United States Code, Section 1963 which enjoins, restrains and prohibits the defendants DENNIS E. PRYBA, BARBARA A. PRYBA, and JENNIFER G. WILLIAMS and any of their agents or nominees, any of the corporations named hereinafter, and anyone acting at their direction or on their behalf, from disposing of certain interests subject to forfeiture pursuant to 18 U.S.C. § 1962, and the Court having considered the motion, it is hereby

ORDERED and ADJUDGED

1. That the aforedescribed original Restraining Order shall be incorporated by reference as if set forth in full.

2. That the corporate and individual bank accounts set forth below shall remain frozen, except for the account activity hereinafter described in this Order.

Bank	Account Name	Account No.
1st American Bank of Virginia 1515 N. Cthse. Rd. Arlington, VA 22201	Educational Books, Inc. 9158 Richmond Hwy. Fort Belvoir, VA	00055123
MD. Nat. Bank 6175 Livingston Rd. Oxon Hill, MD 20745	Video Shop Ltd, Store 30 6193 Livingston Rd. Oxon Hill, MD	512012386
United VA. Bank Northern Region 515 King St. Alexandria, VA 22314	Video Shop Ltd. 9156 Richmond Hwy. Fort Belvoir, VA	080-04-978
1st National Bank of MD 110 S. PACA 6th Floor Baltimore, MD 21201	Home Video Sales, Inc. 8411 Old Marlboro Pike Upper Marlboro, MD	6215279-8
Citizens Bank & Trust of MD 6200 Baltimore Blvd. Riverdale, MD	Marlboro News, Inc. 7425 Annapolis Rd. Hyattsville, MD	0397258
Citizens Bank & Trust of MD Riverdale, MD	B & D Corporation 8411 Old Marlboro Pike Upper Marlboro, MD	037 0341
1st VA. Bank 6400 Arlington Blvd. Falls Church, VA 22042	Video Shop, Ltd. 277 S. Van Dorn St. Alexandria, VA	0774 0344
Suburban Bank and Trust (Sovran Bank of MD) 11160 Veers Mill Rd. Wheaton, MD 20902	Marlboro News, Inc. 7609 Marlboro Pike Forrestville, MD	46-0529-3

Wheaton, MD 20902		
Suburban Bank and Trust (Sovran Bank of MD) Wheaton, MD 20902	B & D Corporation 8411 Old Marlboro Pike #15 Upper Marlboro, MD 11160 Veers Mill Rd.	2801813
United VA Bank Northern Region 515 King Street Alexandria, VA 22314	Barbara A. Pryba	295-93-255

3. That the defendants shall be permitted to continue to conduct the business of B & D Corporation, Inc., Marlboro News, Inc., Educational Books, Inc., Home Video Sales, Inc., and Video Shop, Ltd., Inc. as normal without substantially dissipating or diminishing the value of the assets of the property described in paragraph one of the original Restraining Order.

4. That the defendants shall conduct all financial transactions of said businesses through account number 620-2435-8 in the name of B & D Corporation with the First National Bank of Maryland, which account shall not be restrained by this Order or by the original Restraining Order.

5. That the defendants may transfer funds from the account numbers and up to the "account total" amounts as set forth in "Attachment A" (which equal deposits credited to said accounts after August 13, 1987, to date) to account number 620-2435-8 in the name of B & D Corporation with the First National Bank of Maryland.

6. That account number 295-93-255 in the name of Barbara A. Pryba with the United Virginia Bank, Northern Region, Alexandria, Virginia shall be released from restraint.

SO ORDERED THIS 25th day of August, 1987.

/s/ Richard L. Williams
JUDGE, UNITED STATES DISTRICT COURT

ENTERED Aug. 25, 1987

DEPOSITS MADE AFTER AUGUST 13, 1987

			Account Total
Maryland National Bank (Account #512012386)			
Oxon Hill	8/18/87	904.00	
Rockville	8/18/87	1,198.29	$ 2,102.29
First Virginia Bank (Account #0774-0344)			
Alexandria	8/17/87	873.54	$ 873.54
United Virginia Bank (Account #080-04-978)			
Bailey's Crossroads	8/14/87	339.00	
MC/VISA	8/14/87	1,703.13	
Manassas	8/17/87	329.10	
Bailey's Crossroads	8/17/87	385.00	
Woodbridge	8/17/87	648.12	
Bailey's Crossroads	8/17/87	1,649.67	
Alexandria	8/19/87	239.42	
MC/VISA	8/19/87	543.08	
Alexandria	8/19/87	755.71	
Bailey's Crossroads	8/19/87	897.55	
MC/VISA	8/19/87	1,411.58	
Ft. Belvoir	8/19/87	2,945.72	$11,847.08
First American Bank of Virginia (Account #00055123)			
Educational Books	8/17/87	474.44	
Educational Books	8/17/87	500.73	
Educational Books	8/17/87	881.36	
Educational Books	8/17/87	1,015.00	$ 2,871.53
Citizens Bank (Account #0397258)			

Marlboro News	8/14/87	433.28	
Marlboro News	8/17/87	86.95	
Marlboro News	8/17/87	357.16	
Marlboro News	8/17/87	415.55	
Marlboro News	8/18/87	213.67	$ 1,496.60

Sovran Bank (Account #46-0529-3)

Marlboro News	8/17/87	86.95	
Marlboro News	8/17/87	225.24	
Marlboro News	8/17/87	241.34	
Marlboro News	8/17/87	350.35	
Marlboro News	8/18/87	278.82	$ 1,182.70

"ATTACHMENT A"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

United States of America
v. Criminal No. 87-00208-A
DENNIS E. PRYBA;
BARBARA A. PRYBA;
JENNIFER G. WILLIAMS; and
EDUCATIONAL BOOKS, INC.

THIRD ORDER MODIFYING RESTRAINING ORDER FILED ON AUGUST 13, 1987

This matter having come before this Court on a stipulated Motion of the United States of America and the defendants for modification of the Restraining Order entered by this Honorable Court on August 13, 1987, pursuant to Title 18, United States Code, Section 1963 which enjoins, restrains and prohibits the defendants DENNIS E. PRYBA, BARBARA A. PRYBA, and JENNIFER G. WILLIAMS and any of their agents or nominees, any of the corporations named hereinafter, and anyone acting at their direction or on their behalf, from disposing of certain interests subject to forfeiture pursuant to 18 U.S.C. § 1962, and the Court having considered the motion, it is hereby

ORDERED and ADJUDGED

1. That the aforedescribed original Restraining Order shall be incorporated by reference as if set forth in full.

2. That an Order Modifying Restraining Order filed on August 13, 1987, entered by this Court on August 25, 1987, shall be incorporated herein by reference as if set forth in full and shall remain in effect as modified in this Order.

3. That the United States Marshals Service through its agents, Touche Ross & Co. and its employees, shall ascertain the condition and value of the assets of the property described in paragraph 1 of the aforedescribed original Restraining Order (including but not limited to United Virginia Bank account number 295-93-255 in the name of Barbara Pryba) and First National Bank of Maryland account number 620-2435-8 in the name of B & D Corporation, and shall identify and implement controls necessary to prevent the dissipation of said assets, with minimal impairment of normal business operations, defendants' daily living, and their payment of reasonable attorneys fees. Controls to be implemented may include, but are not limited to, the verification of daily operational cash receipts of the defendants' business concerns.

4. That the United States Marshals Service through its agents, Touche Ross & Co. and its employees, shall monitor the forfeitable property for the purpose of preventing the dissipation of the value of the assets of the forfeitable property. Touche Ross & Co. and its employees shall not disclose any information dated after August 13, 1987, concerning the defendants or their corporations to the government unless it directly concerns the dissipation of assets. This specifically does not preclude Touche Ross & Co. and its employees from discussing with the United States any information which was dated prior to August 13, 1987.

5. That in order to perform said tasks, the U.S. Marshals Service through its agent, Touche Ross & Co. and its employees, shall have access to:

(a) The property described ~~in~~ paragraph 1 of the original Restraining Order and First National Bank of Maryland account number 620-2435-8 in the name of B & D Corporation;

(b) The defendants, B & D Corporation, Inc., Marlboro News, Inc., Home Video Sales, Inc., Video Shop, Ltd.,

Inc., and their financial and operational personnel and facilities;

(c) All relevant and necessary books, records, and documents of the defendants and said corporations, their accounting firms and their financial institutions.

6. That Touche Ross & Co. by its employees shall notify the United States Marshals Service and the United States Attorney's office for the Eastern District of Virginia, Alexandria Division, of any business or financial activity by the defendants which could change the character of an asset or substantially dissipate the value of an asset of the aforedescribed property.

7. That upon written notice by the United States Marshals Service, the defendants shall be enjoined and restrained from any business or financial activity deemed by the United States Marshals Service and the said United States Attorney's office to be capable of changing the character of an asset or substantially dissipating the value of an asset of the aforedescribed property, without written authorization by the United States Marshals Service.

8. That account number 080-04-978 in the name of Video Shop, Ltd., 9156 Richmond Highway, Fort Belvoir, Virginia, with the United Virginia Bank, Northern Region, Alexandria, Virginia, shall be released from restraint; however, the defendants shall be restrained from withdrawing funds from said account to below the balance amount of said account at the time the account was frozen on August 14, 1987, pursuant to the serving of the original Restraining Order.

SO ORDERED THIS 3rd DAY OF SEPTEMBER, 1987.

/s/ Albert V. Bryan, Jr.

JUDGE, UNITED STATES DISTRICT COURT

ENTERED Sept. 3, 1987

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA;
BARBARA A. PRYBA;
JENNIFER G. WILLIAMS; and
EDUCATIONAL BOOKS, INC.

FOURTH ORDER MODIFYING RESTRAINING ORDER FILED ON AUGUST 13, 1987

This matter having come before this court on a stipulated Motion of the United States of America and the defendants for modification of the Restraining Order entered by this Honorable Court on August 13, 1987, and modified by two subsequent consent Orders, it is hereby

ORDERED AND ADJUDGED

1. That paragraph four of the Third Order Modifying the *ex parte* Restraining Order of August 13, 1987, be itself modified to allow Touche Ross & Company and its employees to disclose any and all information that they discover dated after, as well as before, August 13, 1987, to representatives of the United States Marshals Service.

2. That the United States Marshals Service and its employees shall not disclose any information that they learn from Touche Ross & Company and its employees to any other federal government agency or organization or their representatives.

3. That all other provisions of the original Restraining Order dated August 13, 1987, and modifications remain in effect.

So ORDERED this 11th day of September, 1987.

/s/ Albert V. Bryan, Jr.
UNITED STATES DISTRICT COURT JUDGE

ENTERED Sept. 11, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

ORDER

This matter came before the Court on the government's request for leave to withdraw its motion for inquiry into disqualification of defense counsel for possible conflict of interest. For the reasons stated from the bench, it is hereby

ORDERED:

That the government's request for leave to withdraw its motion is DENIED.

For the reasons stated from the bench and in the Court's Memorandum Opinion issued on this date, it is further

ORDERED:

That the government's motion for inquiry into disqualification of defense counsel for possible conflict of interest is DENIED.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 9, 1987

ENTERED Oct. 15, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

ORDER

This matter came before the Court on defendants' motion for a bifurcated trial. Defendants wish to withdraw this motion with leave to renew it should they see fit. It is therefore

ORDERED:

That defendants may withdraw their motion for a bifurcated trial with leave to renew it at the appropriate time.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 9, 1987

ENTERED Oct. 15, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

ORDER

This matter came before the Court on defendants' motion to dismiss Counts I through III of the indictment for failure to plead properly elements of the Racketeer Influenced and Corrupt Organizations Act. For the reasons stated from the bench and in the Court's forthcoming Memorandum Opinion, it is hereby

ORDERED:

That defendants' motion is DENIED.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 9, 1987

ENTERED Oct. 15, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

ORDER

This matter came to the Court on PHE, Inc.'s motion for leave to file an amicus brief. For reasons stated from the bench, it is hereby

ORDERED:

That PHE's motion is DENIED, but with leave to file a similar motion in the future to express views that are new and significant, not merely cumulative. All future motions to file amicus briefs should specifically state such new and significant grounds.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 9, 1987

ENTERED Oct. 15, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

ORDER

This matter came to the Court on defendant Williams' motion for discovery of exculpatory evidence. The United States has advised this Court that all *Brady* materials have been disclosed and produced for all defendants and that the United States recognizes its continuing obligation to disclose all such material. For this reason, it is hereby

ORDERED:

That defendant Williams' motion is DENIED.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 9, 1987

ENTERED Oct. 15, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

ORDER

This matter came to the Court on all defendants' motions to adopt and conform the motions of every other defendant. For the reasons stated from the bench, it is hereby

ORDERED:

That defendants' motions are GRANTED with respect to all motions filed on or before October 9, 1987. All future motions must specifically name each moving party.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 9, 1987

ENTERED Oct. 15, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

ORDER

This matter came before the Court on the individual defendants' motion for production of defendants' statements in the government's possession under Federal Rule of Criminal Procedure 16(a)(1)(A). The United States has advised this Court that all Rule 16 materials relating to the individual defendants have been disclosed to all defendants and that the United States recognizes its continuing obligation to disclose all such materials as they are discovered. For this reason, it is hereby

ORDERED:

That defendants' motion is DENIED.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 9, 1987

ENTERED Oct. 15, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

ORDER

This matter came before the Court on defendant Educational Books, Inc.'s motion for production of the grand jury testimony of its officers and employees under Federal Rule of Criminal Procedure 16(a)(1)(A). For the reasons stated from the bench, it is hereby

ORDERED:

That defendant Educational Books' motion is GRANTED. The government is ordered to produce on or before the morning of October 16 the testimony of any witness before the grand jury who (1) was, at the time of the testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 9, 1987

ENTERED Oct. 15, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

ORDER

This matter came before the Court on defendant Educational Books, Inc.'s motion for a bill of particulars. The United States has represented in open court that it will provide to Educational Books a list of the agents through which the corporation is alleged to have acted. Therefore, defendant's motion is moot.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 9, 1987

ENTERED Oct. 15, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

ORDER

This matter came before the Court on the individual defendants' motion for a bill of particulars. For the reasons stated from the bench, it is hereby

ORDERED:

That defendants' motion is DENIED.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 9, 1987

ENTERED Oct. 15, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

ORDER

This matter came before the Court on defendants' motion under Federal Rule of Criminal Procedure 16(a)(1)(C) to compel the government to identify the documents it intends to use at trial. The United States has represented in open court that it will voluntarily designate the documents it intends to introduce and that it will attempt to do so on or before October 13, 1987. The defendants have represented that they will designate their exhibits by October 14, 1987. For this reason, it is hereby

ORDERED:

That defendants' motion is DENIED.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 9, 1987

ENTERED Oct. 15, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

ORDER

This matter came before the Court on the United States' motion for an extension of time in which to file proposed jury instructions. For the reasons stated from the bench, it is hereby

ORDERED:

That the United States' motion is GRANTED. The United States is directed to file its proposed instructions on October 13, 1987. The defendants shall file their proposed instructions on October 14, 1987. Counsel for the parties shall designate those instructions upon which they cannot agree on or before October 16, 1987.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 9, 1987

ENTERED Oct. 15, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

ORDER

This matter came before the Court on defendants' motion for a continuance of the trial of this action. For the reasons stated from the bench, it is hereby

ORDERED:

That defendants motions is DENIED.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 9, 1987

ENTERED Oct. 15, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.,
Defendants.

ORDER

This matter came before the Court on the United States' motion for a psychiatric or psychological examination of defendant Barbara Pryba under 18 U.S.C. 4241. All arguments of counsel having been considered, it is hereby ORDERED:

That the United States is authorized pursuant to Title 18, United States Code, Section 4241(b) to arrange for a psychiatric or psychological examination of Barbara Pryba by a licensed or certified psychiatrist or clinical psychologist and to have the examiner report back to the Court with the results of such examination in accordance with 18 U.S.C. 4247 (c).

This matter also came before the Court on the United States' motion for a hearing to determine defendant Barbara Pryba's competency to stand trial under 18 U.S.C. 4241(a). In accordance with Title 18, United States Code, Section 4241(a), it is hereby ORDERED:

That the United States' motion for a hearing to determine defendant Barbara Pryba's competency to stand trial is granted. The hearing will be held at 2:30 p.m. on Monday, October 19, 1987.

The Clerk is directed to send copies of this Order to all counsel of record.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 19, 1987
ENTERED Oct. 19, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

SCHEDULING ORDER

In light of the defendants' previous failure to meet deadlines imposed by this Court, the defendants are hereby ordered to adhere to the following schedule:

All evidence pertaining to public opinion polls or surveys conducted at the request of defendants and the bases and support for the methodology and validity of such polls or surveys must be produced to the Court and the government on or before October 21, 1987, at 10:00 a.m. Failure to observe this deadline will result in the exclusion of such evidence at the trial of this matter.

The Clerk is directed to send copies of this Order to all counsel of record.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 20, 1987
ENTERED Oct. 20, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
Plaintiff,
v. Criminal No. 87-208-A
DENNIS E. PRYBA, et al.,
Defendants.

ORDER

This matter came to the Court on the United States' motion to bifurcate. For the reasons stated from the bench, it is hereby ORDERED:

That defendant's motion is GRANTED. The trial will be bifurcated as follows: First, all issues except forfeiture will be presented to the jury. Second, if the jury's verdicts warrant, the issue of forfeiture will be presented to the jury.

The Clerk is directed to furnish copies of this order to all counsel of record.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 21, 1987
ENTERED Oct. 21, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
Plaintiff,

v. Criminal No. 87-208-A

DENNIS E. PRYBA, et al.,
Defendants.

ORDER

This matter came to the Court on defendant Barbara A. Pryba's motion to suppress evidence seized during a search of her residence at 10606 Belmont Boulevard, Lorton, Virginia, on or about October 9, 1986. Defendant asserted that the affidavit in support of the warrant contained facts insufficient to show probable cause. Specifically, defendant asserted that the affidavit set forth no "parameters of time" within which certain alleged activity took place.

The affidavit in question was written by Special Agent Jessie Loftin, and stated that a concerned citizen played a tape recording for Agent Loftin that contained a conversation between a former employee of the Prybas and an unidentified party. During the taped conversations, the former employee said that it was part of his responsibility to collect coins from various "peep booths" and take these coins to 10606 Belmont Boulevard, where a coin machine would be used to count the coins. Defendant asserted that because no time frame was discussed in the tape, the allegations were insufficient to establish probable cause that any evidence was present in defendant's residence at the time the warrant was executed.

However, the affidavit set forth other facts as to illegal activity that was taking place *during the time* the warrant was issued. These include: surveillance of defendant's businesses; review of defendant's bank records from February 1983 to February 1986; investigation of UPS shipments from September 1985 through March 1986; and various statements made by an ex-employee of defendant's businesses in December 1985 and September 1986. The affidavit, taken as a whole, sets forth sufficient facts to imply a time frame and establish probable cause. *See Illinois v. Gates*, 462 U.S. 213 (1983). For these reasons and for reasons stated from the bench, it is hereby ORDERED:

That defendant's motion is DENIED.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 23, 1987
ENTERED Oct. 23, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
Plaintiff,

v. Criminal No. 87-208-A

DENNIS E. PRYBA, et al.,
Defendants.

ORDER

This matter came to the Court on defendant Dennis E. Pryba's motion to suppress all evidence obtained in searches authorized by all warrants upon the grounds that the affidavits filed in support thereof were insufficient to establish probable cause.

Based upon a review of the record and oral argument of counsel, this Court finds that the affidavits were sufficient to establish probable cause. *See New York v. P.J. Video, Inc.*, 106 S.Ct. 1610 (1986). For this reason and for reasons stated from the bench, it is hereby ORDERED:

That defendant's motion is DENIED.

The Clerk is directed to furnish copies of this order to all counsel of record.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 21, 1987
ENTERED Oct. 30, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v. Criminal No. 87-00208-A
DENNIS E. PRYBA, et al.

ORDER

This matter comes before the Court on the oral and written motions and pleadings of the United States and all defendants concerning the admissibility of Educational Books' prior state convictions to prove acts of racketeering under RICO. This order also considers the motion of defendant, Jennifer Williams, to sever in event the prior convictions are not excluded.

This Court holds that defendant Educational Book's prior state court convictions for dealing in obscene matter are admissible to prove predicate acts of racketeering on the part of Educational Books in this federal RICO action.

That Congress intended to permit such evidence is strongly implied by the structure, terms, and purpose of RICO as well as the decisions of several federal courts. Title 18 U.S.C. section 1961 (1)(A) defines racketeering activity as any act or threat involving, *inter alia*, "dealing in obscene matter ... which is chargeable under state law and punishable by imprisonment for more than one year." *Id.* RICO makes clear that certain violations of state law can be predicate offenses under federal RICO. The issue thus becomes whether a state court conviction can be introduced as evidence of racketeering activity or whether the acts underlying the state conviction must be relitigated in a federal RICO suit.

While there is no controlling authority, a number of decisions support the Court's holding that a prior conviction is admissible to prove a predicate act of racketeering activity necessary to establish a RICO violation. In *United States v. Erwin*, 793 F.2d 656 (5th Cir. 1986), the defendant's prior conviction for counterfeiting was admitted to prove one of the requisite two predicate offenses for RICO. "In a subsequent trial for RICO, the government may count, as a predicate offense, a defendant's prior conviction for an offense falling within the definition of 'racketeering activity.' " *Id.* at 670 (citing *United States v. Black*, 759 F.2d 71, 72-73 [D.C. Cir. 1985]). Similarly, *United States v. Persico*, 621 F.Supp. 342 (S.D.N.Y. 1985), held that defendants' guilty pleas and prior convictions in another federal proceeding were admissible as evidence to establish a predicate act under RICO. The *Persico* court stated that Congress, in enacting RICO, "contemplated the admission of prior convictions, obtained pursuant to plea agreements, to establish a predicate act." *Id.* at 871 (citations omitted).

Prior convictions in a state court proceeding are also admissible to establish a predicate act under federal RICO. *United States v. Andreadis*, 366 F.2d 423 (2d Cir. 1966), held that defendant's plea in state court to a charge of false advertising was admissible in a later federal prosecution for mail fraud arising from advertising. *Id.* at 433. Similarly, in *United States v. Myers*, 49 F.2d 230 (4th Cir.), *cert. denied*, 283 U.S. 866 (1931), the Fourth Circuit held that a state court guilty plea to a charge of possession of illegal liquor was admissible in a subsequent federal prosecution for unlawfully selling liquor. *Id.* at 231. Neither case involved RICO. Still, there exists no reason why the rationale of *Andreadis* and *Myers* cannot be applied to a federal RICO prosecution. Indeed, the court in *Persico* cited both *Myers* and *Andreadis* in support of its holding that prior convictions are admissible in a federal RICO action. *Persico*, 621 F.Supp. at 872.

The dual sovereignty rule does not dictate to the contrary. While it is true that both sovereigns may not prosecute the same act or acts, this is no reason to refrain from giving preclusive effect to a state conviction in the RICO context. To hold otherwise would ignore settled doctrine giving preclusive effect to convictions, cause a waste of judicial time and resources, and raise the spectre of inconsistent results.

But prior convictions are only admissible against the RICO defendant who was the subject of the previous conviction. Prior convictions of one RICO defendant are not admissible against co-defendants in a RICO suit to prove acts of racketeering by those co-defendants. Only the defendant who was previously convicted had an opportunity to confront the accusers and witnesses and litigate the matter before a jury.

Where, as here, the indictment alleges that acts of racketeering were committed by all defendants, and only one defendant was the subject of the prior convictions, then the government must adduce proof of other racketeering acts with respect to those defendants separate and apart from the prior convictions. To protect the co-defendants from any prejudicial spillover effect of the prior convictions, the Court will instruct the jury that it cannot consider the prior convictions as proof of a pattern of racketeering acts against any defendant except the one who was the subject of the conviction. To rule otherwise would infringe upon the other defendants' Sixth Amendment rights.

The Court does not at this time address the question whether Educational Books' prior convictions may be used for evidentiary purposes other than to show Educational Books' commission of predicate acts. However, the Court does note that in Presico, a case charging defendants with substantive violations of and conspiracy to violate RICO, the Court stated that in separate trials of the defendants named in the indictment, the government would

be entitled to introduce evidence as to the entire pattern of racketeering activity. 621 F. Supp. at 852.

The Court denies defendant Jennifer Williams' motion under Rule 14, Fed. R. Crim. P., for a severance of defendants. Under Rule 14, whether to grant a severance lies within the discretion of the district court. *United States v Jamar*, 561 F.2d 1103, 1106 (4th Cir. 1977).

Unless a defendant can show that denial of severance will prevent her from receiving a fair trial, defendants who are indicted together are tried together. *United States v. Mandel*, 591 F.2d 1347, 1371 (4th Cir. 1979) rev'd on other grounds, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied. 445 U.S. 961 (1980); *see also United States v. Persico*, 621 F.Supp. 842, 852 (S.D.N.Y. 1985). The Court must weigh the "possible prejudice to the accused against the often equally compelling interests of the judicial process, which include the avoidance of needlessly duplicative trials involving substantially similar proof." *Jamar*, 561 F.2d 1103, 1106.

In the instant case, the Court finds that the balance weighs in favor of a joint trial. Any prejudice to Williams which may result from the admission of Educational Books' convictions will be remedied by the curative instruction which the Court intends to give the jury. *Id.* at 1107-08; *Persico*, 621 F.Supp. at 853 (separate trials not justified because in a joint trial, evidence will be offered against one defendant which is not admissible as to another or because the defendants' roles in the conspiracy differed; appropriate instructions will protect the defendant from prejudicial spillover effect). Considerations of judicial economy also militate heavily in favor of trying all defendants together. *Id.* at 855. The Court, therefore, declines to grant Williams' motion for a severance.

Accordingly, for all the reasons stated herein, the motion to introduce the prior convictions of Educational Books is granted for the limited purpose of proving predicate acts on the part of Educational Books and the jury will be appropriately instructed to consider this solely for that purpose, unless the Court later decides that this evidence may be considered by the jury for other purposes. Additionally, the Court denies defendant Williams' motion for severance.

The Court reserves its prerogative to issue a memorandum opinion on these issues in the future.

/s/ T.S. Ellis, III

T.S. Ellis, III
United States District Judge

Alexandria, Virginia
October 23, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
v.
DENNIS E. PRYBA
BARBARA A. PRYBA
JENNIFER G. WILLIAMS, and
EDUCATIONAL BOOKS, INC.

Criminal No. 87-00208-A

ORDER OF FORFEITURE

WHEREAS, in the Indictment in the above-entitled case, plaintiff, the United States of America, sought the forfeiture of certain properties of defendants Dennis E. Pryba and Barbara A. Pryba (hereinafter referred to as the "defendants") pursuant to 18 U.S.C. § 1963;

AND WHEREAS, on November 10, 1987, a jury found the defendants guilty of 18 U.S.C. § 1962(a), (c) and (d);

AND WHEREAS, on November 18, 1987, the same jury found that the defendants have certain interests in properties listed below which afforded them a source of influence over the enterprise in violation of 18 U.S.C. § 1963(a).

NOW THEREFORE IT IS ORDERED that the following properties are forfeited to the United States of America:

1. A parcel of property commonly known as 8411 Old Marlboro Pike, Unit 15, Upper Marlboro, Maryland, part of the Penn Belt Industrial Condominium complex; purchased in the names of Dennis and Barbara Pryba on or about February 28, 1983 and recorded in the record office of Prince George's County, Maryland, in Deed Book 5652, Page 211.

2. All shares of stock of B & D Corporation.

3. All shares of stock of Educational Books.

4. All shares of stock of Marlboro News, Inc.

5. All shares of stock of Home Video Sales, Inc.

6. All shares of stock of Video Shop, Ltd.

7. All corporate assets of B & D Corporation, located at 8411 Old Marlboro pike, Upper Marlboro, Maryland, including, but not limited to, inventory, United States Currency, bank accounts (including Citizens Bank & Trust account No. 037-0341 and National Bank of Maryland account No. 620-2435-8), machinery, equipment, coin boxes, funiture, fixtures, motor vehicles (including a 1981 Audi VIN No. WAUHC0438BN 03154), and all shares of stock in Educational Books, Inc., Marlboro News, Inc., and Home Video Sales.

8. All corporate assets of Educational Books, Inc., located at 9158 Richmond Highway, Ft. Belvoir, Virginia, including, but not limited to, inventory, United States Currency, bank accounts (including 1st American Bank of Virginia account No. 60055123), coin boxes, cash registers, movie machines, and fixtures.

9. All corporate assets of Marlboro News, Inc., located at 7609 Marlboro Pike, Forrestville, Maryland, and 7425 Annapolis Road, Hyattsville, Maryland, including, but not limited to, inventory, United States Currency, bank accounts (including Citizens Bank & Trust account No. 0397258 and Sovran Bank account No. 46-05290-3), furniture, fixtures, machinery, equipment, cash registers and projectors.

10. All corporate assets of Home Video Sales, Inc., located at 8411 Old Marlboro Pike, Upper Marlboro, Maryland, including, but not limited to, United States Currency, bank accounts (including 1st National Bank of

Maryland account No. 6215279-8), video machines, copy machine, vehicles (including a 1982 BMW 3201 VIN No. WBAAG4303C8069688), and all shares of stock of Video Shop, Ltd.

11. All corporate assets of Video Shop, Ltd. which corporate address is 8411 Old Marlboro Pike, Upper Marlboro, Maryland, (d/b/a Video Rental Centers at the below listed locations: including, but not limited to, video tape cassettes, United States Currency, bank accounts (including Maryland National Bank account No. 512012386, United Virginia Bank account No. 080-04-978, and First Virginia Bank account No. 0774-0344), computers, safe, vehicles (including a 1986 Chevrolet Astro Van VIN No. 1GCDM15206B118910, a 1985 Chevrolet Blazer VIN No. 1G8CT18B4F0210345, and a 1986 Chevrolet Sprint VIN No. JG1MR6852GK806925).

(a) 804 Rockville Pike
Rockville, Md.

(b) 10288 Festival Lane
Manassas, Va.

(c) 6193 Livingston Rd.
Oxon Hill, Maryland

(d) 9156 Richmond Hwy.
Ft. Belvoir, Va.

(e) 8328 Richmond Hwy.
Alexandria, Va.

(f) 13711-A Jefferson Davis Hwy.
Woodbridge, Va.

(g) 277 S. Van Dorn
Van Dorn Plaza
Alexandria, Va.

(h) 3525 S. Jefferson St.
Leesburg Pike
Plaza Bailey's Crossroads, Va.

(i) 13748 Smoketown Road
Dale City, Va.

IT IS FURTHER ORDERED that the Attorney General is authorized to seize the property and dispose of it in accordance with law.

IT IS FURTHER ORDERED that the United States shall publish notice of this Order and its intent to dispose of the property in such manner as the Attorney General may direct. Any person, other than the defendant, asserting a legal interest in the property shall, within thirty (30) days of the final publication of this notice, or his receipt of direct written notice, whichever is earlier, petition the Court for a hearing to adjudicate the validity of his alleged interest in the property. The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

IT IS FURTHER ORDERED that following the Court's disposition of all petitions filed, or if no such petitions are filed following the expiration of the period specified for the filing of such petitions, the United States shall have clear title to the property and may warrant good title to any subsequent purchaser or transferee.

DATED: 11/18/87

/s/ T.S. Ellis, III
United States District Judge

ENTERED Nov. 18, 1987

No. 89-1902

In the Supreme Court of the United States

OCTOBER TERM, 1990

DENNIS E. PRYBA, BARBARA A. PRYBA, EDUCATIONAL BOOKS, INC., and JENNIFER G. WILLIAMS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO) violate the First Amendment where the predicate acts of racketeering are obscenity violations and the forfeited assets consist of books, magazines, and videotapes.

2. Whether the district court was required to conduct a proportionality review to determine if the forfeiture of petitioners' property as a result of their RICO convictions was disproportionate to their crimes.

3. Whether the district court erred in excluding evidence of a public opinion survey and an "ethnographical" study that the defense offered to demonstrate community attitudes toward sexually explicit material.

4. Whether the district court erred in instructing the jury that its determination of obscenity depended on the community's acceptance, rather than its tolerance, of the material at issue.

5. Whether the district court erred in declining to instruct the jury that a RICO conspiracy charge requires proof that the defendant agreed to commit personally at least two predicate acts of racketeering.

6. Whether the district court erred in admitting against the corporate petitioner evidence of 15 previous state obscenity convictions for conduct that was charged as predicate acts of racketeering.

7. Whether the district court erred in declining to ask the prospective jurors on voir dire to identify the community organizations to which they belonged.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1902

DENNIS E. PRYBA, BARBARA A. PRYBA, EDUCATIONAL BOOKS, INC., and JENNIFER G. WILLIAMS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 900 F.2d 748.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1990. The petition for a writ of certiorari was filed on June 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners Dennis and Barbara Pryba were convicted on one count of using income derived from a pattern of racketeering to obtain an interest in an enterprise, in violation of 18 U.S.C. 1962(a) (Count 1); one count of participating in an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count 2); one count of conspiring to violate Section 1962(a), in violation of 18 U.S.C. 1962(d) (Count 3); and seven counts of transporting obscene material in interstate commerce for sale and distribution, in violation of 18 U.S.C. 1465 (Counts 4-10). Petitioner Williams was convicted on all the above counts, except the Section 1962(a) count. Petitioner Educational Books was convicted on the Section 1962(a) and 1962(d) counts.

Dennis Pryba was sentenced to a total of 13 years' imprisonment, all but three years of which were suspended in favor of five years' probation. In addition, he was fined $75,000. Barbara Pryba was sentenced to suspended terms of three years' imprisonment on Counts 1, 2, and 4 through 10, and to a suspended term of ten years on Count 3. She also was sentenced to concurrent terms of three years' probation on each count and was fined $200,000. Williams was sentenced to a three-year prison term, which was ssupended in favor of three years' probation. She also was fined $2,250. Educational Books was fined $200,000.

In addition to the prison terms, probation terms, and fines, the district court entered an order, pursuant to 18 U.S.C. 1963(a), forfeiting the Prybas' illegal enterprise and all its assets, including corporate stock, real property, automobiles, furniture, fixtures, coin boxes, and bank accounts, as well as its videotape and magazine inventory.[1] The order was entered after a separate trial in which the jury found that the forfeited assets afforded the Prybas a source of influence over the charged enterprise.

1. The evidence is summarized in the opinion of the court of appeals. Pet. App. A3-A6. It showed that the Prybas owned corporations that operated nine video rental stores and three bookstores in Northern Virginia.[2] Two of the corporations, B & D Corporation and Educational Books, Inc., operated the Video Rental Center stores, which stocked inventories of general audience videotapes, sexually explicit adult

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[1] Section 1963(a) authorizes the forfeiture of

> (1) any interest the [defendant] has acquired or maintained in violation of section 1962;
>
> (2) any—
>
> (A) interest in;
>
> (B) security of;
>
> (C) claim against; or
>
> (D) property or contractual right of any kind affording a source of influence over;
>
> any enterprise which the [defendant] has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and
>
> (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity * * * in violation of section 1962.

[2] Although the Prybas owned the stock in the corporations, they avoided listing themselves as officers or directors. Petitioner Williams, a long-time employee of the Prybas who performed numerous services for the corporation, including bookkeeping, was listed as president of one of the corporations.

videotapes and magazines, and "marital aids." The stores also ran "peek booths," through which one could view sexually explicit tapes. The videotapes and magazines available for sale at the Video Rental stores depicted, in graphic detail, vaginal and anal intercourse, oral sex, sadomasochistic sex, group sex, homosexual sex, and ejaculation. Some of the magazines created the appearance that the models were teen-age girls, presumably to appeal to pedophiles.

2. Petitioners appealed their convictions, raising seven issues. First, petitioners contended that the RICO forfeiture statute violates the First Amendment where the racketeering activity consists of obscenity offenses and the forfeited property consists of books, magazines, and videotapes. The court of appeals rejected that claim. The court explained that the RICO forfeiture provisions "do[] not violate the First Amendment even though certain materials, books and magazines, that are forfeited, may not be obscene and, in other circumstances, would have constitutional protection as free expression," so long as there is "a nexus established between defendants' ill gotten gains from their racketeering activities and the protected materials that were forfeited." Pet. App. A14. A contrary holding, the court noted, "would allow criminals to protect their loot by investing it in newspapers, magazines, radio and television stations." *Ibid.* The court added that RICO forfeitures have no more of a "chilling effect" on the exercise of First Amendment rights than do the substantial prison terms and fines to which the Prybas were subject for their obscenity offenses alone, without regard to the RICO counts. *Id.* at A16.

Second, petitioners argued that the forfeiture order violated the Eighth Amendment because the loss

of their property was disproportionate to the seriousness of their crimes. The court of appeals held that the Prybas "did not receive a sentence of sufficient severity to trigger a proportionality review," and that even if such a review were appropriate, the Prybas had "failed to proffer the information that would be required for such an undertaking." Pet. App. A17.

Third, petitioners argued that the district court improperly excluded evidence of a public opinion survey and an "ethnological" study that petitioners offered to demonstrate community standards with respect to sexually explicit material. The court of appeals disagreed, concluding that the jurors would not have been helped by the evidence because "the questions presented by the pollsters in conducting their surveys did not accurately and fully describe the challenged material being sold by the [petitioners]." Pet. App. A18.

Fourth, petitioners challenged the district court's refusal, when conducting voir dire, to ask the prospective jurors seven of the 117 questions that petitioners had submitted. The court of appeals concluded that the district court did not abuse its discretion in finding some of the proposed questions "overly intrusive." Pet. App. A19.

Fifth, petitioners contended that the district court erroneously admitted the corporate petitioner's 15 previous state obscenity convictions as evidence of the corporation's predicate acts of racketeering. The court of appeals rejected the claim, adopting the opinion of the district court. Pet. App. A20. The district court reasoned that excluding the convictions "would ignore settled doctrine giving preclusive ef-

fect to convictions, cause a waste of judicial time and resources, and raise the spectre of inconsistent results." *Id.* at A116.

Sixth, petitioners argued that the district court should have instructed the jury that the measure of obscenity is not community acceptance but rather community tolerance. The court of appeals concluded that such a standard would distort the test for obscenity because people often tolerate circumstances that they find disagreeable but can do nothing about. Pet. App. A22.

Finally, petitioners claimed that the district court should have instructed the jury that to convict on the RICO conspiracy count it must find that a defendant agreed to commit personally at least two predicate acts of racketeering, and not that he agreed only to the commission of the predicate acts by others. The court of appeals rejected that argument on the ground that, under general conspiracy law, "[t]he heart of a conspiracy is the agreement to do something that the law forbids. There is no requirement that each conspirator personally commit illegal acts in furtherance of the conspiracy or to accomplish its objectives." Pet. App. A24.

ARGUMENT

1. Petitioners contend (Pet. 5-20) that the forfeiture provisions of the RICO statute, 18 U.S.C. 1963(a), violate the First Amendment when the predicate acts are obscenity violations and the property forfeited consists of expressive material, such as books and magazines. The courts below properly rejected this claim. This Court has already held that obscenity violations may serve as predicate acts for a conviction under state racketeering laws. *Fort Wayne Books, Inc.* v. *Indiana*, 109 S. Ct. 916 (1989). The Court acknowledged that the prison sentence and fine authorized by the state RICO statute at issue there were more severe than those authorized for a simple obscenity offense and that, as a result, booksellers might "practice self-censorship and remove First Amendment protected materials from their shelves." *Id.* at 925. The Court observed, however, that "deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws, and our cases have long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.'" *Id.* at 925-926, quoting *Smith* v. *California*, 361 U.S. 147, 154-155 (1959). Accordingly, the Court concluded that "[t]he mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional." 109 S. Ct. at 926.

The same analysis applies to the RICO forfeiture provisions at issue here. There is no First Amendment principle that prohibits Congress from imposing a forfeiture penalty for engaging in a pattern of

racketeering consisting of multiple obscenity violations. "It is not for this Court . . . to limit the [government] in resorting to various weapons in the armory of the law." *Fort Wayne Books, Inc.*, 109 S. Ct. at 925 (quoting *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 441 (1957)). A forfeiture penalty is no more "chilling" than a prison sentence or fine. Indeed, if the indictment had simply alleged obscenity offenses, the Prybas would have been subject to 35 years' imprisonment and $3,500,000 in fines. Those penalties are far more severe than the RICO forfeiture imposed here.

Furthermore, there is no merit to petitioners' argument that the forfeiture of racketeering-related assets is impermissible where the forfeited materials are books and magazines. The purpose of the RICO forfeiture provisions is to "divorc[e] guilty persons from the enterprises they have corrupted." *United States* v. *Cauble*, 706 F.2d 1322, 1350 (5th Cir. 1983), cert denied, 465 U.S. 1005 (1984). Expressive materials are subject to forfeiture "not because of any likelihood of obscenity, but because they were personal property realized through or derived from crime." *Western Business Systems, Inc.* v. *Slaton*, 492 F. Supp. 513, 514 (N.D. Ga. 1980). The fact that the RICO predicate acts are obscenity violations rather than, for example, narcotics violations is irrelevant; in either instance the purpose of the forfeiture is "not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity." *4447 Corp.* v. *Goldsmith*, 504 N.E.2d 559, 565 (Ind. 1987). Indeed, if bookstores, newsstands, publishing houses and the like were immune from forfeiture, drug lords and other racketeers could invest in those

businesses and thereby insulate their criminal proceeds from seizure.[3]

2. Petitioners also contend (Pet. App. A21-A22) that the district court should have conducted a proportionality review to determine whether the forfeiture of their property constituted cruel and unusual punishment in violation of the Eighth Amendment. Although this Court has held that a criminal sentence must be proportionate to the crime for which the defendant has been convicted, *Solem* v.

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[3] Petitioners cite no case—and we are aware of none—holding that the federal government may not obtain forfeiture of expressive materials as punishment for a crime. Petitioners rely on *State* v. *Feld*, 155 Ariz. 88, 745 P.2d 146 (Ct. App. 1987), where a state court upheld the constitutionality of the State's RICO forfeiture provisions but apparently limited their application to the obscene materials themselves and to the proceeds of the sale of obscene materials or the proceeds of other racketeering activity. 155 Ariz. at 97, 745 P.2d at 155. The state court's interpretation of state law, which predated *Fort Wayne Books, Inc.*, has little bearing here. Petitioners also rely on several noncriminal decisions of this Court invalidating state action designed specifically to restrict expressive activity. *E.g.*, *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981) (use of zoning power to prohibit live nude dancing); *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980) (statutory bar against future exhibition by theater of films not yet found to be obscene based on past exhibition of obscene films); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963) (requests to booksellers by state commission, using threat of criminal prosecution, to remove "objectionable" publications from their shelves); *Marcus* v. *Search Warrant of Property*, 367 U.S. 717 (1961) (statutory authorization of pretrial seizure of materials on the determination by police officers that they are obscene). None of these cases can fairly be read as bringing into question the forfeiture of racketeering-related assets under the RICO statute just because those assets happen to consist of materials that, in other circumstances, would be protected by the First Amendment.

Helm, 463 U.S. 277, 290 (1983), it has made clear that "[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare" (*id.* at 289-290, quoting *Rummel* v. *Estelle*, 445 U.S. 263, 272 (1980)), and that "a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." *Solem*, 463 U.S. at 290 n.16.

The court of appeals correctly held here that a "[proportionality] analysis is not required because [petitioners] did not receive a sentence of sufficient severity to trigger a proportionality review." Pet. App. A17. As this Court has explained, "[r]eviewing courts * * * should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes." *Solem*, 463, U.S. at 290. Congress has concluded that petitioners' crimes are serious. Under the penalties that Congress has set, the Prybas' predicate obscenity offenses alone could have been punished by 35 years' imprisonment and a fine of $3,500,000. The RICO forfeiture, which involves assets whose total value appears to be substantially less than the permissible fine for the predicate offenses (see Gov't C.A. Br. 36), is not disproportionate to the gravity of their crimes and falls well within the Eighth Amendment's bounds.

Petitioners contend that the court of appeals' decision conflicts with *United States* v. *Busher*, 817 F.2d 1409 (9th Cir. 1987). There, the court of appeals held that where a defendant "makes a prima facie showing that the forfeiture may be excessive, the district court must make a determination, based upon appropriate findings, that the interest ordered forfeited is not so grossly disproportionate to the

offense committed as to violate the eighth amendment." *Id.* at 1415. It is doubtful, however, that the Ninth Circuit would have found that the record in this case established a prima facie showing of excessiveness, particularly since petitioners did not even attempt to make a proffer in the district court regarding the value of their forfeited assets. As the court of appeals stated, even if a proportionality review would otherwise have been appropriate, petitioners "have failed to proffer the information that would be required for such an undertaking." Pet. App. A17.

3. Petitioners next challenge (Pet. 23-26) the district court's refusal to admit into evidence two social science studies that petitioners offered to show that their wares were not obscene. The first study consisted of a social science professor's public opinion telephone survey assessing community attitudes toward sexually explicit material. The professor asked participants whether they thought that the portrayal of "nudity and sex" in materials available only to adults had become more or less acceptable in recent years, and whether adults should be able to obtain and view materials depicting nudity and sex. Pet. App. A99. The second study consisted of a sociologist's "ethnographical" survey. The sociologist visited various book and video stores in the community that sold "adult" magazines and videotapes, talked to the customers and operators of the stores about sexually explicit materials, and consulted newspaper editors about letters they received regarding sexually explicit material. The district court did not abuse its "wide discretion" in excluding these studies.

See *Hamling* v. *United States*, 418 U.S. 87, 108 (1974).

First, as the district court explained, the telephone survey was "not designed to elicit information about whether there was community acceptance of the actual materials in question or similar materials." Pet. App. A98. Rather, it was designed to elicit information about "the general political question whether adults should be able legally to obtain pornography." *Ibid.* The opinions of the survey's respondents about whether the viewing of nudity and sex in the abstract has become more acceptable or whether adults should be able to obtain material depicting nudity and sex are not, as the district court concluded, "relevant to the question whether depictions such as those at issue are actually accepted in the community." *Id.* at A99. Asking a person in a telephone interview whether he is offended by depictions of sex and nudity is, in the words of the court of appeals, a "far cry" from asking him about the graphic sexual representations contained in the material in question. *Id.* at A18. See *United States* v. *Various Articles of Merchandise*, 750 F.2d 596, 599 (7th Cir. 1984) (surveys, to be admissible, "must address material clearly akin to the material in dispute").[4]

[4] Moreover, even if the survey was marginally relevant, the district court correctly ruled, under Fed. R. Evid. 403, that the probative value of the evidence was substantially outweighed by the danger that it would confuse the jury by diverting its attention to the political question whether obscene material should be protected. Pet. App. A103. The state cases on which petitioners rely do not help them. In *People* v. *Nelson*, 88 Ill. App. 3d 196, 410 N.E.2d 476 (App. Ct. 1980), and *Saliba* v. *State*, 475 N.E.2d 1181 (Ind. Ct. App. 1985), the survey did not merely ask the participants whether sexually explicit material had become more acceptable in the community in recent years, but also asked whether they personally thought it acceptable for an adult to view such material. 88 Ill. App. 3d at 200, 410 N.E.2d at 480; 475 N.E.2d at 1191. The opinion in *Carlock* v. *State*, 609 S.W.2d 787 (Tex. Crim. 1980), the third case cited by petitioners, does not indicate what questions the survey asked. Furthermore, none of these state cases described the sexually explicit material at issue. In this case, the words "nudity and sex" do not begin to convey the graphic nature of the material found to be obscene.

Similarly the district court did not err in excluding the sociologist's testimony concerning his "ethnographical" study. First, the sociologist was not qualified as an expert on contemporary standards of obscenity in Northern Virginia. Pet. App. A107-A111. His study consisted of little more than a one-man, eight-day series of interviews with dealers and customers of sexually explicit material, and with the editors of various local newspapers about letters they had received concerning pornography. As the district court concluded, "[t]o permit this so-called 'study' to masquerade as expert testimony on Northern Virginia's contemporary community standards of obscenity is ludicrous." *Id.* at A111.[5]

[5] In addition, the study was based on only those sexually explicit materials found in the stores that he visited—stores that had been chosen with the assistance of a Pryba employee. The sociologist did not show the films or magazines here at issue to his interviewees and, as the district court noted, there was no evidence that the two groups of material were comparable. Pet. App. A108-A109. The district court also properly ruled that the sociologist's testimony was inadmissible under Rule 403 because "being clothed in the guise of expert testimony, [it] would have diverted the jury's attention from the issue of community acceptance of the charged materials to the issue of community acceptance of noncomparable materials." *Id.* at A112. Petitioners argue that there is con-

4. In instructing the jury concerning the "contemporary community standards" test of *Miller* v. *California*, 413 U.S. 15 (1973), the district court stated that "[c]ontemporary community standards are set by what is, in fact, accepted in the adult community as a whole, and not by what the community merely tolerates." Pet. App. A21. Petitioners contend (Pet. 26-27) that this instruction is incorrect because the legal measure for obscenity under *Miller* depends not on what the community accepts, but rather on what it tolerates. This claim is without merit.

This Court has sometimes used the words "tolerance" and "toleration" when discussing the *Miller* test. See *New York* v. *Ferber*, 458 U.S. 747, 761 n.12 (1982); *Smith* v. *United States*, 431 U.S. 291, 295 (1977). But the Court has never stated that the standard for obscenity is what the community will "endure" or "put up with." As the court of appeals observed, "[t]o consider community toleration as synonymous with what a community will put up with skews the test of obscenity and invites one to consider deviations from community standards, because a community can be said to put up with a

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fusion among the federal and state courts concerning the standard for admissibility of comparable material evidence. The courts agree, however, that in order to be admissible such evidence must at the very least be similar to the evidence alleged to be obscene. *E.g.*, *United States* v. *Pinkus*, 579 F.2d 1174, 1175 (9th Cir.), cert. denied, 439 U.S. 999 (1978); *United States* v. *Womack*, 509 F.2d 368, 377 (D.C. Cir. 1974), cert. denied, 422 U.S. 1022 (1975). Here, the district court found that the tapes and magazines that the sociologist examined were either noncomparable or not shown to be comparable. Pet. App. A109. That factual finding does not warrant this Court's review.

number of disagreeable circumstances that it cannot stop." Pet. App. A22. See also *Hoover* v. *Byrd*, 801 F.2d 740, 741-742 (5th Cir. 1986) (substituting "tolerance" for decency "affronts the notion of 'standards', because tolerance embodies the permissible *deviations* from standards.").

Petitioners' argument reduces to the contention that, since some sexually explicit materials are available in the community, the community necessarily tolerates those materials, and therefore that those materials are not legally obscene under *Miller*. This Court, however, effectively rejected that approach in *Hamling* v. *United States*, *supra*, where it held that "the availability of similar materials on the newsstands of the community does not automatically make them admissible as tending to prove the non-obscenity of the materials which the defendant is charged with circulating." 418 U.S. at 125. See also *United States* v. *Manarite*, 448 F.2d 583, 594 (2d Cir.) ("Evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance."), cert. denied, 404 U.S. 947 (1971). Indeed, in *United States* v. *Battista*, 646 F.2d 237, 245, cert. denied, 454 U.S. 1046 (1981), the Sixth Circuit held outright that community acceptance rather than tolerance is the correct measure of obscenity under *Miller*. Accord *Sedelbauer* v. *State*, 428 N.E.2d 206, 210-211 (Ind. 1981), cert. denied, 455 U.S. 1035 (1982). Petitioners cite no authority to the contrary.

5. The district court instructed the jury that, in order to convict on the RICO conspiracy count, it must find that "each defendant agreed to personally

commit or aid and abet two or more acts of racketeering in violation of Section 1962(a), or that each defendant agreed that another co-conspirator would commit two or more acts of racketeering in violation of [Section] 1962(a)." Gov't C.A. Br. 58. Petitioners contend (Pet. 27-28) that the court's charge was erroneous because it allowed the jury to convict even if it failed to find that a defendant agreed to commit personally at least two predicate acts.

The crime of conspiracy typically requires proof of an agreement whose objective is the commission of one or more unlawful acts. *Braverman* v. *United States*, 317 U.S. 49, 53 (1942). There is no requirement that each conspirator agree that he will himself perform the illegal acts that constitute the conspiracy's objectives. On the contrary, a conspirator may be convicted upon a showing that he "agree[d] to participate in the conspiracy with knowledge of the essential objectives of the conspiracy." *United States* v. *Carter*, 721 F.2d 1514, 1528 n.21 (11th Cir.), cert. denied, 469 U.S. 819 (1984). See *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947) (law requires only "showing sufficiently the essential nature of the plan and [the conspirator's] connections with it").

In light of these basic principles of conspiracy law, the court of appeals properly held that the RICO conspiracy statute should be construed simply to require an agreement to participate in an enterprise, understanding and agreeing that the enterprise's affairs will be conducted through the commission of at least two criminal acts. There is no evidence that Congress, in enacting the conspiracy provision of the RICO statute, intended to depart from the general principles of conspiracy law. Indeed, far from imposing the additional restrictions on the prosecution that petitioners urge, Congress mandated that the RICO statute be liberally construed to effectuate its purpose. A requirement that each RICO conspirator agree to commit personally the requisite predicate acts would undermine the congressional objective of combatting organized crime because it would have the effect of exempting from the coverage of the conspiracy provision those organized crime figures shrewd enough to insulate themselves from particular criminal acts committed by their colleagues. See *United States* v. *Neapolitan*, 791 F.2d 489, 497-498 (7th Cir.), cert. denied, 479 U.S. 940 (1986).

As petitioners point out, two circuits have stated that a RICO defendant must agree to participate in the conduct of the enterprise through his own commission of the predicate acts. *United States* v. *Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983); *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984). Those two early decisions, however, have been rejected by every other court of appeals that has subsequently ruled on the issue. See *United States* v. *Leisure*, 844 F.2d 1347, 1367 (8th Cir.), cert. denied, 488 U.S. 932 (1988); *United States* v. *Rosenthal*, 793 F.2d 1214, 1228 (11th Cir. 1986); *United States* v. *Neapolitan*, 791 F.2d at 492-498; *United States* v. *Joseph*, 781 F.2d 549, 554-555 (6th Cir. 1986), cert. denied, 480 U.S. 919 (1987); *United States* v. *Adams*, 759 F.2d 1099, 1116 (3d Cir.), cert. denied, 474 U.S. 971 (1985); *United States* v. *Tille*, 729 F.2d 615, 619 (9th Cir.), cert. denied, 469 U.S. 845 (1984).

Although the First Circuit case, *Winter*, contains language contrary to the majority rule, the issue

petitioners raise here was not presented in that case. The jury in *Winter* was instructed that conviction required an agreement to commit two predicate acts personally. The defendants argued on appeal that a RICO conspiracy requires more—proof that the defendant actually committed two predicate acts of racketeering. The First Circuit rejected that argument. The court's statement that a RICO conspiracy requires an agreement to commit two or more predicate acts personally is therefore dictum. The court had no occasion to consider the sufficiency of an agreement that co-conspirators commit the predicate acts. See 663 F.2d at 1135-1136.

Unlike the First Circuit in *Winter*, the Second Circuit in *Ruggiero* reversed a conviction for RICO conspiracy, but the court's analysis of the RICO conspiracy issue was not necessary to its decision. The issue of the proper construction of Section 1962(d) arose in connection with the appeal of defendant Tomasulo. The indictment charged Tomasulo with participating in a RICO conspiracy based on two predicate acts. The court concluded on appeal that one of the two predicate acts did not qualify as an act of racketeering at all. For that reason, the court concluded that Tomasulo's conviction was invalid without regard to whether he had agreed to commit that act himself or had simply agreed that the act would be committed by one of his co-conspirators. In either case, the agreement that he was alleged to have entered included only one valid act of racketeering and, accordingly, was not a violation of Section 1962(d). See 726 F.2d at 921.

In any event, the *Ruggiero* and *Winter* courts did not have the benefit of the other court of appeals decisions that have adopted what has become the majority rule. Indeed, the *Ruggiero* court stated that

it considered its construction of Section 1962(d) to be required by "prevailing case law." 726 F.2d at 921. Since that time, every circuit to consider the issue has ruled contrary to *Ruggiero* and *Winter*. Because of this more recent case law, the First and Second Circuits might well reconsider their decisions when presented with an opportunity to do so.[6]

6. Petitioners contend (Pet. 29) that the district court improperly admitted evidence of the corporate petitioner's 15 previous state obscenity convictions for conduct that was charged in the RICO counts as predicate acts of racketeering. They rely on the dual sovereignty doctrine, which holds that the Double Jeopardy Clause does not bar successive prosecutions by separate sovereigns, such as the federal government and a state government, for offenses arising from the same criminal act. See *Heath* v. *Alabama*, 474 U.S. 82 (1985); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959). Petitioners reason that since a defendant cannot invoke a previous state acquittal to bar a federal prosecution for the same offense, the government should not be permitted to introduce previous state court convictions in order to prove RICO predicate acts.

There is no legal basis for the rule of parallelism for which petitioners contend. The reason that a

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[6] This Court repeatedly has denied certiorari in cases raising this same issue. See *Wougamon* v. *United States*, cert. denied, 488 U.S. 960 (1988); *Finestone* v. *United States*, cert. denied, 484 U.S. 948 (1987); *Stewart* v. *United States*, cert. denied, 480 U.S. 919 (1987); *Messino* v. *United States*, cert. denied, 479 U.S. 939 (1986); *Neapolitan* v. *United States*, cert. denied, 479 U.S. 940 (1986); *Adams* v. *United States*, cert. denied, 474 U.S. 971 (1985); *Tillie* v. *United States*, cert. denied, 469 U.S. 845 (1984); *Morris* v. *United States*, cert. denied, 469 U.S. 819 (1984).

state court acquittal does not bar a later federal prosecution for the same criminal act is that such a bar would interfere with the sovereign power of the federal government to punish transgressions of its laws, just as a bar to a state prosecution because of an earlier federal acquittal would interfere with the inherent sovereignty of the particular State. See *Heath*, 474 U.S. at 88-89. By contrast, permitting one sovereign to use a previous conviction by another sovereign to prove a violation of its own laws does not interfere with the inherent power of either. Accordingly, the dual sovereignty doctrine provides no basis for excluding evidence of the 15 state convictions in the federal prosecution.

7. During voir dire, the defense requested the district court to ask the prospective jurors to identify the community organizations to which they belonged. Although the court did ask most of the 117 questions submitted by the defense, many with subparts (Pet. App. A19), it declined to ask that question, explaining that it would not have "50 jurors stand up and give me their *curriculum vitae* on what organizations they're a member of." Gov't C.A. Br. 49. Petitioners contend (Pet. 30) that the district court abused its discretion in refusing to ask that question.

In *Smith* v. *United States*, 431 U.S. 291 (1977), on which petitioners rely, the Court did not suggest that it is necessary to ask prospective jurors in obscenity cases to list every community organization to which they belong. Rather, the Court stated that it "might be helpful" during voir dire to ascertain "with what organizations having an interest in the regulation of obscenity the juror has been affiliated." *Id.* at 308. The Court emphasized that the "propriety of a particular question is a decision for the trial court to make in the first instance." *Ibid.* Although the district court did not ask the question that the defense requested, it did ask the prospective jurors whether "you or any member of your family [are] members of any organization that has as its objective or purpose or as one of its objectives or purposes the promotion or the suppression of pornography or allegedly obscene material." Gov't C.A. Br. 50. That is precisely the question suggested by *Smith*. In light of the question that the district court did ask, it plainly did not abuse its discretion in declining to ask the question submitted by petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 89-1902

In The

Supreme Court of the United States

October Term, 1989

DENNIS E. PRYBA,
BARBARA A. PRYBA,
EDUCATIONAL BOOKS, INC.
and
JENNIFER G. WILLIAMS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

CORRECTED COPY

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Reply to
United States Brief in Opposition

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STATEMENT OF PARENT COMPANIES AND SUBSIDIARIES

For a listing of all parent companies and subsidiaries of defendant, Educational Books, see Petition for Writ of Certiorari, p. 1.

POINT I

POST-TRIAL FORFEITURE HAS SERIOUS CONSTITUTIONAL IMPLICATIONS WHICH SHOULD BE ADDRESSED BY THIS COURT

The Government asserts that there is no need for this Court to address the constitutionality of post-trial forfeiture upon a conviction of obscenity since it has previously determined that obscenity violations may serve as predicate acts under state RICO laws. *Fort Wayne Books, Inc. v. Indiana*, ____U.S.____, 109 S.Ct. 916 (1989). Thus, because forfeiture is but a sanction imposed under a valid statutory scheme, any consequent, deleterious effect upon free speech has no greater a constitutional implication than the imposition of fines and imprisonment.

The Government's position reinforces the petitioners' belief that certiorari should be granted. Its denial will undoubtedly result in a plethora of RICO obscenity prosecutions and forfeitures since the Court will be deemed to have upheld, by implication, the viability of forfeiture. The legality of those forfeitures, in turn, will be endlessly disputed until this Court determines the matter. Since forfeiture has been imposed in *United States v. Pryba*, the several, significant constitutional questions posed upon imposition of that forfeiture are ripe for review.

Furthermore, while petitioners will agree that all sanctions imposed upon conviction of obscenity will result in some self-censorship and hinder, to some extent, the dissemination of adult

entertainment, the effect of that hindrance and the method by which it occurs must be analyzed with care. While the Court, in *Fort Wayne Books, Inc. v. Indiana*, upheld the criminal penalties under the Indiana RICO statute,[1] it noted that these sanctions were not "significantly different" from other punishments imposed upon obscenity convictions. Forfeiture *is* significantly different in the breadth of its application, the nature of the punishment and the effect it necessarily has on both the criminal defendant and those who wish access to adult bookstores. If forfeiture is affirmed, without even review by the Supreme Court, the widespread instances of RICO forfeitures upon obscenity convictions may quite conceivably result in the disappearance of "adult entertainment." That possibility alone illustrates that forfeiture, indeed, is not akin to lengthy terms of imprisonment or imposition of severe fines. The constitutional implications are not illusory nor are they insignificant. That being the case, the Government's position that review need not be undertaken because the result is no more onerous than those punishments which have been imposed in past, is untenable. Petitioners reassert that this case merits the Court's review.

POINT II

THE COURT WAS REQUIRED TO CONDUCT A PROPORTIONALITY REVIEW OF THE FORFEITURE OF PETITIONERS' INTEREST IN THE RICO ENTERPRISE

The Government asserts that the lower court was not required to conduct a proportionality review of the forfeiture of petitioners' assets as compared with the crimes of which they were convicted.

[1] Indiana civil forfeiture provisions are included in the State's Civil Remedies for Racketeering Activity (CRRA) statute. *See, Indiana Code*, §34-4-30.5-1, *et seq.* (1982 & Supp. 1987).

In support of this position, the Government asserts that the petitioners failed to make a prima facie showing that the forfeiture here may have been excessive. This position completely ignores the wealth of testimony elicited both during trial and at the forfeiture hearing. That testimony specifically revealed that the total "ill-gotten gains" generated from the sale or rental of the obscene materials which served as the basis for petitioners' conviction totalled $105.30 (TT-1707-1710; 1678-1682).[2] As a result, however, petitioners were ordered to forfeit the assets of five corporations including three bookstores, nine video rental stores, five vehicles, over 7,600 videotapes, all furniture, fixtures, machinery, computers, movie machines, equipment, and safes, as well as all bank accounts (A-164-167).[3] In addition, the records admitted at trial indicated that for the fiscal year ending 1986, the total sales from petitioners' expressive businesses amounted to $2,067,667.17 (TT-1409).

The stark contrast between the $105-figure and this large volume of forfeited property required the district court to review petitioners' claim that the interest ordered forfeited was grossly disproportionate to the offense committed and thus violated the Eighth Amendment. *See, United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987). The Fourth Circuit is simply incorrect in holding (as it did in this case [A-17] and in *United States v. Whitehead*, 849 F.2d 849, 860 (4th Cir. 1988)), that a proportionality review need not be conducted when the sentence is less than life imprisonment without possibility of parole.

Secondly, the Government's claim that the forfeiture was not disproportionate, given the other, stringent penalties which could have been imposed, misses the mark. A proportionality review weighs the severity of the crime against the penalty invoked: that

[2] References to "TT" are to the trial transcript.

[3] References to "A" are to the Appendix to the Petition for Writ of Certiorari.

alternative sanctions could have been meted out by the trial court is totally irrelevant to the analysis. Here, on the basis of income from sales or rental of obscene material constituting .005% of the businesses' total sales or rental, the Government was able to shut twelve expressive businesses by confiscating all of their inventories of presumptively protected films and magazines as well as all of the neutral assets needed to distribute these materials. When the total forfeiture imposed in this case is combined with the fines and prison sentence imposed, the harshness of the penalty is clearly not proportional to the gravity of the offense.

POINT III

THE DEFENSE PROFERRED RELEVANT EXPERT TESTIMONY WHICH SHOULD HAVE BEEN ADMITTED AT TRIAL

The Government contends that the total exclusion of all expert testimony in this case was proper. First, it asserts that the defense-proferred survey failed to elicit information concerning community acceptance of the materials in issue. This position conflicts with the decisions of various courts (*see*, Petition for Writ of Certiorari, pp. 23-25) and fails to recognize the relevant issues sought to be explored.

Specifically, the survey inquired whether the interviewees believed they should be able to buy or rent materials depicting "nudity and sex" and whether adults who want to should be able to obtain and view such materials.[4] Answers to these questions would undoubtedly have revealed information relevant to a determination of the community's acceptance of such materials.

[4] "Nudity and sex" was defined as, "nude bodies in close up, graphic depictions of a variety of sexual activities, including: sexual intercourse, ejaculation, bondage, oral sex, anal sex, group sex and variations of these by adult performers."

Moreover, contrary to the Government's assertion, the description of the materials as put to the interviewees mirrored the activities depicted in those materials. In fact, far briefer descriptions have been held sufficient to adequately apprise magistrates for purposes of issuing search warrants. *See, e.g., United States v. Christian*, 549 F.2d 1369, 1370 (10th Cir. 1977); *United States v. Marks*, 520 F.2d 913, 916 (6th Cir. 1975); *United States v. Pryba*, 502 F.2d 391, 410 (D.C. Cir. 1974). The survey questions proferred by the defense clearly revealed a valid attempt to convey the visual image of the materials to the interviewees and was sufficient to meet the law's relevancy requirements.

Secondly, the Government contends that the ethnographic study submitted by the defense was also properly excluded. This position fails to take into account a substantial body of precedent which establishes that *widespread* community availability of comparable materials is probative of community acceptance. *See, United States v. Various Articles of Obscene Merchandise, Seizuire No. 182*, 750 F.2d 596 (7th Cir. 1984); *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132 (2nd Cir. 1983); *United States v. 2,200 Paperback Books*, 565 F.2d 566, 571 (1977).

Indeed, the study at issue revealed a pervasive availability and consumption of sexually explicit materials within the relevant geographic area. Based upon the information he gathered, the expert determined that sexually-explicit materials comparable to those on trial were extensively distributed and purchased throughout the area. His findings of widespread availability and patronage of such works allowed the expert to assess contemporary community standards regarding the acceptance of the materials in issue and thereby permitted an inference of acceptance by the trier of fact. The exclusion of this testimony was improper.

POINT IV

TOLERANCE, NOT ACCEPTANCE, IS THE PROPER STANDARD TO BE APPLIED IN DETERMINING CONTEMPORARY COMMUNITY STANDARDS

Petitioners urge this Court to decide whether tolerance or acceptance is the proper measuring stick by which to determine community standards. Because the *Miller* test[5] is designed to ensure that, "the community [does not], where liberty of speech and press are at issue, condemn that which it generally tolerates," *Smith v. California*, 361 U.S. 147, 171 (1959) (Harlan, J., concurring in part and dissenting in part), petitioners assert that tolerance is the appropriate standard. Indeed, the First Amendment's toleration of speech, not necessarily accepted by the majority, is intrinsic to its existence. As explained by the Court in *Pope v. Illinois*, 481 U.S. 497, 500 (1987), "the ideas a work represents need not obtain majority approval to merit protection." By requiring an acceptance standard the Court of Appeals ruling, in effect,

[5] That test requires consideration of:

(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;

(b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 25 (1973).

requires majority approval. Such a requirement unquestionably violates the very foundational principles of the First Amendment.[6]

POINT V

RESTRICTED *VOIR DIRE* DENIED PETITIONERS THE RIGHT TO EFFECTIVELY EXERCISE THEIR PEREMPTORY CHALLENGES

The defense and Government have polarized views about the extent to which *voir dire* was conducted in this case. What is clear is that the jurors were asked approximately seventeen questions during a morning session of the Court which began at 10:00 a.m. and was completed by lunch (TT-1017-1076). Strikingly apparent from the list of questions asked is the total absence of questions designed to reveal the juror's involvement in his community. In keeping with the Supreme Court's recognition that in an obscenity case it might be helpful to know how heavily a juror has been involved in the community, *Smith v. United States*, 431 U.S. 291 (1977), the defense requested that the trial court inquire into what community organizations the prospective jurors belonged. While the court asked the prospective jurors if they belonged to any organizations whose objectives were to promote or suppress pornography or allegedly obscene material, absolutely no inquiry was made as to the jurors' connection with any other type of community organization.

[6] The Government confuses the proper legal standard issue (tolerance v. acceptance of sexually explicit materials) with matters of proof regarding the availability or acceptability of sexually explicit materials in the community proferred to show what is tolerated. While it is true that the fact that various works are available does not necessarily mean they are tolerated, the defense experts provided proof beyond mere availability which showed toleration as well as acceptance of these materials. However, that is an evidentiary issue and does not address the correct legal standard with which the jurors must be charged.

Since the jurors were required to apply contemporary community standards to two prongs of the three-part obscenity test, this information was particularly crucial to the defendant's ability to gauge the jurors' knowledge regarding their community. Clearly, the right to exercise peremptory challenges is a hollow one when the defense has absolutely no information about the individuals deciding the defendant's fate. As the Supreme Court specifically recognized:

> Veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge their counsel has of them, which may include their group affiliations, in the context of the case to be tried.

Swain v. Alabama, 380 U.S. 202, 220-221 (1965). Unfortunately, in this case where affiliations and community contact are crucial to a juror's knowledge and application of community standards, the defense was bereft of pertinent information — a lack which impaired its ability to intelligently exercise the right to peremptory challenge.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

DENNIS E. PRYBA, BARBARA A. PRYBA, EDUCATIONAL BOOKS, INC. AND JENNIFER G. WILLIAMS *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 89-1902. Decided October 15, 1990

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

One of the questions presented in this case is the nature of the agreement necessary to sustain a conviction under the RICO conspiracy statute, 18 U. S. C. §1962(d). Section 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c)" of Section 1962. Here, petitioners were convicted under that statute for conspiring to violate Section 1962(a), which provides in relevant part:

> "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

Title 18 U. S. C. §1961(5) defines the term "pattern of racketeering activity" to require at least two acts of racketeering activity.

The trial court in this case instructed the jury that to convict petitioners of RICO conspiracy, the government had to prove that "each defendant agreed to personally commit or aid and abet two or more acts of racketeering in violation of Section 1962(a) *or* that each defendant agreed that *another coconspirator* would commit two or more acts of racketeering

in violation of 1962(a)." (Emphasis added.) In affirming petitioners' convictions, the United States Court of Appeals for the Fourth Circuit joined a majority of Courts of Appeals in holding that a conviction for RICO conspiracy does not require that the defendant personally agree to commit two or more predicate acts of racketeering; rather, it is sufficient if the defendant agrees to the commission of the predicate acts by another coconspirator. See *United States* v. *Pryba*, 900 F. 2d 748, 760 (CA4 1990).

As the Fourth Circuit acknowledged, *id.*, two Courts of Appeals have adopted a contrary view, holding that a RICO conspiracy conviction requires that the defendant have agreed to personally commit two or more predicate acts. See *United States* v. *Ruggiero*, 726 F. 2d 913, 921 (CA2), cert. denied *sub nom. Rabito* v. *United States*, 469 U. S. 831 (1984); *United States* v. *Winter*, 663 F. 2d 1120, 1136 (CA1 1981), cert. denied, 460 U. S. 1011 (1983). I have voted in the past to resolve the conflict among the Courts of Appeals on this issue. See *Adams* v. *United States*, 474 U. S. 971 (1985) (WHITE, J., dissenting). As I noted in my dissent there, if the majority view is correct, "Congress' intent is being frustrated in those circuits which adhere to the narrower view of RICO conspiracy." *Id.*, at 973. On the other hand, if the minority view is correct, "defendants are being exposed to conviction for behavior Congress did not intend to reach under § 1962(d)." *Ibid.* To resolve the conflict, I would grant certiorari, limited to Question 5 presented in the petition for certiorari.